

**H. (No. 2)**

*v.*

**CTBTO PrepCom**

**135th Session**

**Judgment No. 4603**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr M. H. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom, hereinafter “the Commission”) on 26 November 2018, the Commission’s reply of 3 May 2019, the complainant’s rejoinder of 8 June 2019, supplemented on 24 June, the Commission’s surrejoinder of 13 September 2019, the complainant’s first additional submission of 26 November 2019, the Commission’s comments thereon dated 9 March 2020, the complainant’s second additional submission of 21 May 2020 and the Commission’s final comments of 5 August 2020;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision not to extend his fixed-term appointment on account of his unsatisfactory performance.

The complainant joined the Commission in June 2011 as a Personnel Officer, grade P-4, under a three-year fixed-term contract. The first six months of his appointment were a probationary period, which he completed successfully. However, in his performance appraisal reports (PARs) for 2012 and 2013, his supervisor indicated that his overall

performance did not meet expectations and that improvements were needed, particularly with regard to certain managerial competencies. In May 2014, shortly before his fixed-term contract was due to expire, a meeting took place between the complainant, his immediate supervisor and the Head of Administration at which he was informed that, based on his 2012 and 2013 PARs, a one-year extension of his contract would be recommended instead of the usual two-year extension. He was told that this was intended to provide him with an opportunity to improve his performance, and his attention was drawn to the specific shortcomings that needed to be addressed. The complainant accepted the one-year extension on 27 June 2014.

In his PAR for 2014, completed in January 2015, his supervisor again considered that his overall performance did not meet expectations and that improvements were needed in several areas. In February 2015 the Director of Administration recommended that the complainant's contract should not be extended beyond its expiry on 26 June 2015, because his performance had not improved. The complainant was notified by memorandum of 18 February 2015 that the Executive Secretary had decided to follow that recommendation.

On 2 March 2015 the complainant lodged a request for review of the decision not to extend his contract. That same day, he initiated the rebuttal procedure in order to challenge his 2014 PAR. The non-extension decision was confirmed by the Executive Secretary on 31 March 2015, and on 20 April 2015 the Personnel Advisory Panel issued a report in which it concluded that the complainant's 2014 PAR should be "sustained". On 22 April the complainant submitted a request for suspension of action to the Joint Appeals Panel (JAP), in which he requested that the non-extension decision be suspended pending the outcome of the rebuttal process. The following day, the Executive Secretary informed him that he agreed with the conclusion of the Personnel Advisory Panel concerning his 2014 PAR, and he provided the complainant with a copy of the Panel's report. On 30 April 2014 the complainant lodged an appeal with the JAP challenging the decision not to extend his appointment. A few days later, he informed the JAP that his request for suspension of action was meant to cover the period until the end of the

appeal proceedings, not just the rebuttal process. After having held an oral hearing with the complainant, on 15 June 2015 the JAP recommended that the request for suspension of action be rejected. The Executive Secretary accepted that recommendation on 25 June 2015.

The JAP issued its report on the complainant's appeal on 6 September 2018. It recommended that the Executive Secretary should maintain the challenged decision but that the complainant should be awarded material damages in an amount equal to two months' salary and benefits because the Administration had been late in giving him notice of the non-extension of his contract. The JAP also recommended an award of 5,000 euros in moral damages for procedural errors in the handling of his case and 3,000 euros in moral damages for the delay in dealing with his appeal. By a letter of 8 October 2018, the Executive Secretary informed the complainant that he had decided to accept all of these recommendations. That is the impugned decision.

The complainant asks the Tribunal to award him compensation equivalent to his loss of earnings from the date of separation until the end of the normal seven-year period of service, that is, until 26 June 2018, taking into account annual step increments and an average rate of inflation of 1.5 per cent. He also requests adequate compensation for his loss of earning capacity from the end of that seven-year period of service until he reaches the mandatory retirement age. He claims lump-sum compensation in an amount equivalent to 30 years of pension entitlements, calculated on the basis of contributory service from 1 September 2000, when he became a participant in the United Nations Joint Staff Pension Fund (UNJSPF), until the mandatory retirement age, as well as moral damages in the amount of 250,000 euros, and exemplary damages in the amount of 350,000 euros.

The Commission asks the Tribunal to dismiss the complaint as partly irreceivable and unfounded for the remainder.

## CONSIDERATIONS

1. In the decision, dated 8 October 2018, which the complainant impugns, the Executive Secretary accepted the JAP's recommendation to maintain the initial decision of 18 February 2015 not to extend the complainant's appointment beyond its expiry date (26 June 2015) on the basis of unsatisfactory performance. The Executive Secretary confirmed that decision in a letter of 31 March 2015 rejecting the complainant's request for review. In the impugned decision, the Executive Secretary also accepted the JAP's recommendation to compensate the complainant, by way of material damages, for the late notice he was given of the non-renewal of his appointment and by way of moral damages for procedural errors in handling his case and for delay in the internal appeal proceedings.

2. Consistent case law has it that a decision not to extend or renew a fixed-term appointment is discretionary and may be set aside only on limited grounds. Where the reason given for the non-renewal is unsatisfactory performance, the decision can be successfully impugned if it is fundamentally flawed, for example, by procedural defects, a failure to take account of some essential fact, abuse or misuse of authority, or if it was based on an error of fact or of law (see Judgment 3743, under 2). The Tribunal has also consistently held that "an organisation cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance" (see Judgment 3932, under 21). The Tribunal has also stated that if the reason given for the non-renewal of a fixed-term contract is the unsatisfactory nature of the performance of the staff member concerned, who is entitled to be informed in a timely manner as to the unsatisfactory aspects of her or his service, the organisation must base its decision on an assessment of that person's work carried out in compliance with previously established rules and that allied to this is an obligation to afford an opportunity to improve (see Judgment 4289, under 7, and the case law cited therein) and that an international organization must comply with its own procedures in relation to performance appraisals (see, for example, Judgment 3150, under 9).

3. The complainant challenges the impugned decision on the bases that the entire situation which led to the decision not to extend his appointment is tainted by procedural and substantial flaws; by omission of facts and mistaken conclusions drawn from the facts (which he states the JAP repeated) as well as by misuse of authority and administrative bullying.

4. Before considering the merits of the complaint, two procedural issues must be addressed. The first is the complainant's request for an oral hearing. In view of the ample and sufficiently clear written submissions and evidence provided by the parties, the Tribunal considers that it is fully informed about the case to make a decision on the issues raised for consideration in the complaint. It will not therefore grant this request.

5. In the second place, the Commission raises an objection to the receivability of aspects of the complaint based on non-compliance with the requirement set out in Article VII, paragraph 1, of the Statute of the Tribunal, according to which a complaint shall not be receivable unless the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations. The irreceivable aspects, according to the Commission, include the complainant's claim for continued participation in the UNJSPF; his claim for compensation for loss of earning capacity from 26 June 2018 until retirement age; his claim for compensation for pension entitlements from 27 June 2015 to 30 October 2025 and his contest of the decision to grant him only a one-year extension of contract in 2014. The Tribunal holds that these claims are irreceivable, pursuant to Article VII, paragraph 1, of the Tribunal's Statute, as the complainant did not lodge a request for review contesting them in the Commission's internal appeal procedure. Such a request was required pursuant to Staff Rule 11.1.02, which provides that, as a first step in the appeals procedure, a written request for review must be submitted to the Executive Director within two months from the date of notification of the contested administrative decision.

6. The complainant's pleas concerning misuse of authority and administrative bullying are clearly unfounded as there is no persuasive evidence that bears them out.

7. To the extent that the complainant raises questions concerning human rights violations allegedly committed by the Austrian authorities and matters relating to his family circumstances, those questions relate to private rather than work-related matters and are not concerned with the non-observance of the complainant's terms of appointment. Pursuant to paragraph 5 of Article II of the Tribunal's Statute, they are not within the competence of the Tribunal.

8. It is common ground that there were procedural irregularities in the complainant's 2014 PAR process. In its report, the JAP concluded that two such irregularities occurred during that process. The complainant raises them again in the complaint. The JAP had concluded that the Administration failed to follow the provisions related to the completion of PARs contained in Administrative Directives No. 2 (Rev.5) and No. 58. However, the JAP concluded, without any basis in legal authority, that while the irregularities were "potential failings of the [complainant's] supervisors, [...] it would have been incumbent upon the [complainant] to follow-up more proactively in regard to [those] issues".

9. The JAP had noted that the complainant's immediate supervisor separated from the Commission with effect from 30 June 2014 without completing an appraisal report for the complainant pursuant to paragraph 4.1 of Administrative Directive No. 2 (Rev.5) and paragraph 4.3 of Administrative Directive No. 58. Paragraph 4.1(iii) of Administrative Directive No. 2 (Rev.5) relevantly states that upon a supervisor's separation from the Commission, she or he is required to appraise the performance of a staff member unless an appraisal was conducted within the previous six months. Notwithstanding that the JAP concluded, in effect, that this provision was violated with the result that there was no input in the 2014 PAR by the complainant's immediate supervisor for half of the period under assessment, the JAP erred when it additionally stated that it was the complainant's responsibility to ensure that his

former supervisor completed an assessment before she separated from the Commission. Under paragraph 4.1(iii) it was the responsibility of the supervisor, and, by extension of the Commission, to ensure that the former conducted an assessment prior to her separation from service. By failing to do so the Commission did not comply with paragraph 4.1(iii).

10. The flawed nature of the decision not to extend the complainant's appointment is evidenced even more fundamentally by reference to the JAP's further conclusion that there was procedural irregularity in the complainant's 2014 PAR process because, contrary to paragraph 6.2 of Administrative Directive No. 2 (Rev.5), the objectives for his 2014 appraisal were established on 28 January 2015, after the 2014 appraisal period had ended, rather than at the beginning of that period. Paragraph 6.2, which is under the rubric "Establishing objectives for the appraisal period", relevantly states as follows:

"[...] Objectives for each staff member must be established at the beginning of the appraisal period each year and will be the basis for appraising a staff member's performance annually at the end of the appraisal period. The annual assessment of a staff member's performance must be based on the extent to which objectives that have been jointly agreed between the staff member and his/her supervisor have been fulfilled. The objectives should describe the planned activities of the staff member in supporting the work of the Commission as provided for in the staff member's job description. The objectives should describe the expected outcome of activities. The objectives should be specific, measurable, achievable and time-bound. [...] Following consultation with the staff member, the supervisor should also indicate any recommended training or development activities. [...]"

11. This mandatory provision provides the basis without which there can be no lawful appraisal of a staff member's performance. Inasmuch as the complainant's objectives for the period 1 January to 31 December 2014 were not prior established, contrary to paragraph 6.2, there were no bases on which the complainant's performance for that period could lawfully have been assessed. Having concluded that failure to establish the objectives amounted to a procedural irregularity, the JAP erred when, obviously misapprehending the fundamentality of the procedural flaw, it then stated that it would have been incumbent

upon the complainant to follow up more proactively in regard to the issue.

12. The JAP stated that it could not conclude from the evidence that there was procedural irregularity in breach of paragraph 6.2 of Administrative Directive No. 2 (Rev.5), which, in the context of performance appraisal, required a supervisor to indicate any recommendation for training or development activities for a staff member. It is however noteworthy that in the complainant's 2013 PAR, his supervisor did recommend that a plan be established to assist the complainant to improve his performance. It is also noteworthy that the minutes of a meeting in May 2014 between the complainant and his then supervisor and the Chief of the Human Resources Section stated that a performance improvement plan was to be established as the basis to monitor the complainant's future performance. No such plan was ever established. The Administration thereby failed to implement a performance management plan which it had itself identified to assist the complainant to improve his performance during 2014.

13. In light of the foregoing flaws in the complainant's 2014 PAR, the decision not to extend his appointment for unsatisfactory performance on the basis of that PAR was unlawful. The impugned decision, dated 8 October 2018, will therefore be set aside. The complainant is entitled to an award of material damages in the amount of 30,000 euros for the loss of the valuable opportunity to have his appointment extended. Inasmuch as the complainant has not articulated, with any degree of particularity, the specific effects which the unlawful decision has had upon him, divorced from his personal circumstances more generally, the Tribunal will not award him the moral damages that he claims. The Tribunal rejects the complainant's request to increase the award of 3,000 euros, recommended by the JAP, paid to him for delay in the internal procedural appeals process as he has not justified an increase. As the complainant has provided no evidence or analysis to demonstrate that there was bias, ill will, malice, bad faith or other improper purpose on which to base an award of exemplary damages (see, for example, Judgment 4181, under 11), his claim for such damages



will be dismissed. The Commission will be ordered to pay the complainant 1,000 euros in costs.

#### DECISION

For the above reasons,

1. The impugned decision, dated 8 October 2018, is set aside.
2. The Commission shall pay the complainant material damages in the amount of 30,000 euros.
3. The Commission shall also pay the complainant 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ