

109th Session

Judgment No. 2943

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr F.J. F. (now J. V.-M. F. further to a Court order of the State of Delaware dated 14 September 2009) against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 23 October 2008 and corrected on 12 December 2008, the Commission's reply of 18 February 2009, the complainant's rejoinder of 1 June, supplemented on 16 July, and the Commission's surrejoinder of 15 July, supplemented on 18 August 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 5 of its Rules;

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 an American national born in 1961. He joined the Provisional Technical Secretariat of the Preparatory Commission on 29 November 1998 as a services officer at grade P-3, under a

three-year fixed-term appointment, which was subsequently extended several times. As from October 2002 he held grade P-4.

On 8 July 1999 the Commission issued Administrative Directive No. 20 (Rev.2) introducing thereby a seven-year tenure policy, which is described in detail in Judgment 2690, under A. A system for implementing that policy is set out in a Note from the Executive Secretary of 19 September 2005, the terms of which were incorporated in the complainant's contract by means of a rider that he signed on 6 October 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 post shall be advertised in parallel to considering the incumbent for exceptional extension in accordance with the Directive. In a memorandum accompanying his Note, the Executive Secretary underlined that the possibility for an incumbent to gain an exceptional extension, because of the need to retain essential expertise or memory in the Secretariat, would be judged against what the general job market can offer.

A vacancy announcement was issued with regard to the complainant's post on 8 December 2006. By a memorandum dated 23 March 2007 the complainant's Division Director made his written proposal, in accordance with paragraph 3.2 of Administrative Directive No. 20 (Rev.2), to the Personnel Section concerning the possible extension of the complainant's appointment. He stated that the factors set forth in the Directive and the potential expertise identified externally "ma[d]e it difficult to identify an overriding justification for an exception because of the need to retain essential expertise or memory. However, the risks related to the ongoing E-learning project and its level of priority in the overall strategy of the [Secretariat] should be taken into account". The Personnel Advisory Panels met on 26 March to assess the outcome of the interviews and the possibility of granting an exceptional extension to the complainant due to the need to retain essential expertise or memory. As there was still no clarity on certain duties of the position, in particular the status of the E-learning project in which the complainant took part, they met

again on 19 April 2007 when they decided to endorse the proposal of the Director who had informed the Panels of his willingness to maintain his written proposal. Thus, they unanimously recommended that an external candidate be appointed.

By memorandum of 15 May 2007 the complainant was informed that the Executive Secretary had decided, after consideration by the Personnel Advisory Panels, that there was no basis for granting him an exceptional extension based on the need to retain essential expertise or memory in the Secretariat. Consequently, he had decided not to extend his fixed-term appointment beyond its expiry date of 28 November 2007. The complainant requested a review of that decision on 13 June but the Executive Secretary informed him by a letter dated 21 June that he was maintaining it.

The complainant filed an internal appeal with the Joint Appeals Panel on 11 July 2007 against the Executive Secretary's decision. In its report of 3 July 2008 the Panel concluded that the contested decision was procedurally flawed on the ground that the requirements of Administrative Directive No. 20 (Rev.2) had not been scrupulously observed. It noted *inter alia* that the written proposal made by the complainant's Director on 23 March 2007 did not contain a "clear and unequivocal recommendation, accompanied by a justification" on the possible reappointment of the complainant. It held that the Personnel Advisory Panels' recommendation was not adequately justified. These failures were evidence of "carelessness" on the part of the Commission and showed a lack of respect and due consideration towards the complainant. It therefore recommended that the decision be set aside, that the process of considering the complainant for an exceptional extension be recommenced from the stage at which the flaw it identified occurred, and that he be awarded material and moral damages. The complainant nevertheless separated from service on 28 November 2007.

By a letter dated 1 August 2008, which is the impugned decision, the Executive Secretary informed the complainant that he had decided not to endorse the Joint Appeals Panel's recommendations

on the grounds that it erred in fact and in law in holding that the proposal of 23 March 2007 did not contain a “clear and unequivocal recommendation”. In his view, the proposal clearly meant that the Director was making a recommendation against the exceptional extension of his appointment.

B. The complainant contends that, according to the Tribunal’s case law, Administrative Directive No. 20 (Rev.2) required the Commission to ensure that both the vacancy announcement advertising his post and his job description were accurate and up to date prior to posting the announcement. Since the defendant has failed to update his job description, some of his duties, especially those relating to the tasks that he had undertaken as Project Manager, were not acknowledged and therefore did not appear in the vacancy announcement. Hence, a meaningful assessment of what the general job market could offer was not possible.

He draws attention to the Joint Appeals Panel’s finding that the written proposal made by his Director on 23 March 2007 did not contain a clear and unequivocal recommendation for or against the granting of an exceptional extension. In his view, this proposal was a mere suggestion as to what the Personnel Advisory Panels should consider in making their recommendation on a possible exceptional extension and not a recommendation within the meaning of paragraph 3.2 of the above-mentioned Directive.

The complainant also alleges that the defendant breached its duty to act in good faith, in particular in failing to update his job description; as a result his dignity and professional reputation were harmed.

He asks the Tribunal to set aside the impugned decision and to award him material damages equivalent to the salary, allowances and other benefits he would have received had his contract been extended from 29 November 2007 to 28 November 2009, together with interest on this amount. He also claims moral damages in the amount of 25,000 euros and costs.

C. In its reply the Commission submits that the complaint is irreceivable. Firstly, it indicates that the facts of the present case are, in essence, the same as those at issue in the case which led to Judgment 2763 and in which the complainant was an intervener. In accordance with the rule against double jeopardy, the Commission cannot be put twice in jeopardy of defending itself for the same administrative decision. Secondly, the complaint must be dismissed in accordance with the principle of *res judicata* as its main purpose is identical to that of the complainant's application to intervene.

On the merits, it argues that, by a memorandum of 7 November 2006, the Chief of the Personnel Section forwarded to the Executive Secretary the revised job description of the complainant's post, which the Executive Secretary approved on 6 December 2006; that is to say before the posting of the vacancy announcement.

The Commission contends that the Director's proposal of 23 March 2007 complied with the requirement of paragraph 3.2 of Administrative Directive No. 20 (Rev.2), which provides that the proposal on the possible extension of an appointment "be accompanied by a justification as to the recommendation contained therein". There is no reference in the Directive to a "clear and unequivocal" recommendation; these adjectives were wrongly added by the Joint Appeals Panel. It submits that in any event the Director's statement that the potential expertise identified externally "ma[d]e it difficult to identify an overriding justification for an exception because of the need to retain essential expertise or memory" in the Secretariat clearly means that he was not prepared to recommend an exceptional extension of the complainant's appointment.

The defendant denies any bad faith in the decision-making process leading to the complainant's separation and stresses that he has produced no evidence in support of his contention. Lastly, it submits that the complainant is not entitled to damages since his fixed-term appointment expired in accordance with its terms on the mutually agreed date. Moreover, the decision was taken within the discretionary authority of the Executive Secretary and in the interest of the Commission.

D. In his rejoinder the complainant asserts that the complaint is receivable and points out that, in accordance with Judgment 676, someone who intervenes in a complaint does so on account of his interest in the outcome and consequently may file a complaint of his own if the case should fail. He adds that the Commission did not question the receivability of the internal appeal before the Joint Appeals Panel.

On the merits, he maintains that his Director's proposal of 23 March 2007 is ambiguous and does not meet the requirements of Administrative Directive No. 20 (Rev.2). In his view, the recommendation could be read as meaning that the Director was in favour of an extension even though there was no "overriding justification". He criticises the lack of transparency and argues that the interpretation retained by the Commission is evidence of lack of fairness.

The complainant is surprised to learn that his job description was revised in December 2006. He has never heard about the memorandum of 7 November 2006 and the Executive Secretary's decision of 6 December 2006. He notes that these elements were not communicated to the Personnel Advisory Panels either; consequently, the Panels based their recommendation *inter alia* on a partly erroneous job description. He adds that this information was not mentioned during the proceedings before the Joint Appeals Panel. In acting this way, the Commission did not show good faith and breached its duty of care.

E. In its surrejoinder the Commission contends that the complaint is irreceivable on the ground that the complainant has not provided the original, or a duly certified copy, of the power of attorney of his representative, as required by paragraphs 1 and 2 of Article 5 of the Rules of the Tribunal. Moreover, the rejoinder does not bear the signature of the complainant. In addition, it disagrees with the complainant's interpretation of Judgment 676 and considers that no new and unforeseeable fact of decisive importance, that would justify reviving the case, occurred between the delivery of Judgment 2763 and the date of filing of the present complaint.

On the merits, it indicates that it was not the complainant's job description "as a staff member" that was updated by the Personnel Section and approved by the Executive Secretary on 6 December 2006 but the job description of the post that was to be advertised. Thus, the revised job description would become effective and applicable only to the person who would be appointed upon completion of the recruitment process initiated at the time. Consequently, no right was infringed pursuant to the revision of the job description.

CONSIDERATIONS

1. The complainant joined the Commission under a three-year fixed-term appointment on 29 November 1998. After three two-year extensions his contract was set to expire on 28 November 2007. Administrative Directive No. 20 (Rev.2) was introduced on 8 July 1999. According to paragraphs 4.1 and 4.2, length of appointment is limited to seven years; exceptions may be made however "because of the need to retain essential expertise or memory in the Secretariat", but exceptions must be kept "to an absolute minimum".

2. On 19 September 2005 a Note and a memorandum were published setting out the system for implementing the seven-year service limitation provisions in Administrative Directive No. 20 (Rev.2). The Note requires that the post be advertised and interviews conducted to establish whether an exceptional extension should be granted to the incumbent. The memorandum specifies that the possibility for the incumbent to gain an exceptional extension will be judged against what the general job market can offer. The complainant signed a rider to his contract on 6 October 2005 by which the provisions of the Note of 19 September were incorporated into his contract. On 8 December 2006 a vacancy announcement for the complainant's post was issued and interviews of external candidates

were subsequently held. In accordance with the Note of 19 September 2005, Personnel Advisory Panels were assembled to compare the complainant (as incumbent) against the external candidates in order to decide whether he was eligible for a further extension of his contract beyond the seven-year maximum period of service on the basis of the need to retain essential experience or memory. The Personnel Advisory Panels met twice and issued a report on 19 April 2007 recommending in favour of an external candidate.

3. The complainant received a memorandum dated 15 May 2007 notifying him of the Executive Secretary's decision not to extend his appointment beyond the expiry date of 28 November 2007. The complainant requested a review of that decision, which was denied, and he filed his appeal on 11 July 2007. The Joint Appeals Panel's report, dated 3 July 2008, found in his favour and recommended to the Executive Secretary:

- “(a) [t]o set aside his decision not to grant the [complainant] an exceptional extension of his appointment beyond the seven-year limitation of service established by Administrative Directive No. 20 (Rev.2);
- (b) [t]o recommence the process of considering the [complainant] for an exceptional extension based on essential expertise or memory, beginning with the stage at which the procedural flaw identified by the [Joint Appeals] Panel occurred;
- (c) [t]o award material damages to the [complainant], taking into account the request of the [complainant] in his Statement of Appeal as well as the organization's experience with other cases where a new decision of the Executive Secretary has been taken as a result of a procedural flaw;
- (d) [t]o award moral damages in the amount of US\$5,000 for the organization's failure to treat the [complainant] with dignity, respect and due consideration.”

In a letter dated 1 August 2008, the complainant was notified of the Executive Secretary's decision not to follow the recommendation of the Joint Appeals Panel but, instead, to dismiss his appeal. That is the decision impugned before the Tribunal.

4. The Commission contests the receivability of the complaint on the grounds of violation of the principles of double jeopardy and of *res judicata*, as well as violation 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 organisation, there is no violation of Article 5.

5. So far as regards double jeopardy and *res judicata*, the Commission observes that the complainant intervened in the case which led to Judgment 2763 while his internal appeal in respect of the present matter was still pending. It contends that the grounds for the current complaint are the same as those in the intervention. It argues that it should not have to defend the same decision again. In that judgment the Tribunal held that “[t]o the extent that the present complaint is dismissed, the application for intervention must also be dismissed. To the extent that the complaint is allowed, there is nothing to suggest that the interveners are in the same position in fact and in law as the complainant. It follows that the applications for intervention must be dismissed.” The present complaint is confined to factual and legal issues which are different from those decided in that case. Accordingly the arguments based on double jeopardy and *res judicata* are rejected.

6. On the merits of the case, the Tribunal is of the opinion that the complaint is founded. Established case law holds that, pursuant to Administrative Directive No. 20 (Rev.2), the Commission is under a duty to ensure that “both the vacancy announcement and the job description [are] accurate and up-to-date prior to the posting of a vacancy announcement” (see Judgment 2658, under 9). Further, it was said in Judgment 2763 that “the possibility of granting an exceptional extension is to be judged against what the general job market can offer. [...] This aspect of the process can only be accomplished through an advertising and screening process based on a vacancy announcement that accurately reflects the duties and responsibilities of the position”. These requirements with respect to the job description and vacancy announcement are fundamental. If they are not observed, there is no basis for comparison between an incumbent and what the

job market can offer. Moreover, their non-observance is likely to lead to other irregularities in the process.

7. In the present case, the job description under which the complainant worked was out of date and did not accurately reflect his duties and responsibilities. A revised job description was prepared prior to the issuing of the vacancy announcement. However, the revised job description, on which the vacancy announcement was based, was not referred to the complainant, apparently on the ground that it was to be “prospective”. Neither the revised job description nor the vacancy announcement accurately reflected the magnitude or importance of the complainant’s work as Project Manager of the Commission’s flagship E-learning project (to which he dedicated several hours a week). Moreover, the vacancy announcement did not specify that the applicant would be the new Project Manager, responsible for the continued development of the E-learning project and the subsequent maintenance, service and support of the project once it was fully established. Rather, it merely stated that, as part of the duties and responsibilities, the selected candidate would, inter alia, “[c]oordinate the development of training courses and supporting material, including e-learning, for use by authorized users of States Signatories”. In view of these inaccuracies, the impugned decision must be quashed.

8. Although the impugned decision must be set aside by reason of the failure to ensure the accuracy of the job description and the vacancy announcement, it is convenient to note two other matters, both of which were referred to in the Joint Appeals Panel’s report. The first concerns the terms of the “proposal” by the Division Director. It was stated in the written proposal of 23 March 2007:

“The factors set forth in [Administrative Directive No.] 20 (Rev.2) and the potential expertise identified externally make it difficult to identify an overriding justification for an exception because of the need to retain essential expertise or memory. However, the risks related to the ongoing E-learning project and its level of priority in the overall strategy of [the Provisional Technical Secretariat] should be taken into account.”

The Joint Appeals Panel said of this memorandum that it “did not contain a clear and unequivocal recommendation” and, thus, “did not comply with the requirements of section 3.2 of Administrative Directive No. 20 (Rev.2)”. It also noted that the Personnel Advisory Panels observed at their second meeting that “there was ‘still no clarity’ as to the status of the E-learning project”, yet recommended in favour of an external candidate on the basis of an “oral recommendation” to that effect by the Division Director. The Joint Appeals Panel was of the view that the “oral recommendation” also constituted a procedural flaw. In his decision rejecting the complainant’s internal appeal, the Executive Secretary categorised these findings as involving “both an error of law and a mistake of fact”. The Executive Secretary stated that there was no requirement for “a clear and unequivocal recommendation” and that the Division Director was not making an “oral recommendation” but simply “explaining [...] the essence of his proposals and recommendation contained in his memorandum of 23 March 2007”.

9. The Commission advances arguments in these proceedings to the same effect as the reasons given by the Executive Secretary with respect to the proposals that were before the Personnel Advisory Panels. These arguments must be rejected. The memorandum of 23 March 2007 was, at best, an equivocation but not a recommendation or proposal. The essence of a recommendation or proposal is that it is directed to some definite course of action. No definite course of action was proposed or recommended by the Division Director until the second meeting of the Panels. The difficulties associated with the Division Director’s memorandum and his later oral recommendation, as well as the incongruous situation in which a recommendation was made in favour of an external candidate, even though there was no clarity in relation to the E-learning project, followed, almost inevitably, from the failure to ensure the accuracy of the vacancy announcement and job description placed before the Panels.

10. The complainant requests material damages equivalent to what he would have earned if his contract had been extended for

a period of two 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 two 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 be considered for an exceptional extension in accordance with Administrative Directive No. 20 (Rev.2). The Tribunal fixes that compensation in an amount equivalent to the 12 months' salary, allowances and other benefits that the complainant would have received had his appointment been extended for 12 months from 29 November 2007. The Tribunal also awards the complainant moral damages in the sum of 5,000 United States dollars. It finds however that the complainant 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 must be dismissed. The complainant is entitled to 5,000 dollars for costs related to the internal appeal and his complaint 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 12 months' salary, allowances and other benefits based on the amount that he would have earned had his appointment been extended for 12 months from 29 November 2007.
3. It shall pay him 5,000 United States dollars in moral damages.
4. It shall also pay him 5,000 dollars in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 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 8 July 2010.

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