

**110th Session**

**Judgment No. 2980**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms T. N.-F. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 5 May 2009, the Commission's reply of 22 June, the complainant's rejoinder of 11 September and the Commission's surrejoinder of 30 October 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, a Kenyan national born in 1960, joined the Commission's Provisional Technical Secretariat (hereinafter "the Secretariat") on 1 December 2000 as an Associate Analyst, at grade P-2, in the International Data Centre Division. Her initial three-year fixed-term appointment was extended twice, for a period of two years each time, and was due to expire on 28 November 2007, by which time she would have accumulated a total of seven years' service in the Secretariat.

By Administrative Directive No. 20 (Rev.2) of 8 July 1999 the Commission introduced a seven-year tenure policy which is described

in detail in Judgment 2690, under A, and in Judgment 2763 in which the complainant was an intervener. Part of the 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 into the complainant's contract by means of a rider that she signed on 11 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 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 another Panel, comprised of the same members, assesses the possibility of granting an exceptional extension to the incumbent. Once all interviews have been conducted, the division director submits a proposal on possible reappointment of the incumbent. The members of the Panels hold "a unique meeting" in order to consider 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. They then make a recommendation to the Executive Secretary. In a memorandum accompanying the Note, the Executive Secretary underlined that the possibilities for an incumbent to gain an exceptional extension would be judged against what the general job market could offer.

On 19 October 2006 a vacancy announcement was issued in respect of the complainant's post. The Executive Secretary appointed the members of the Personnel Advisory Panels on 28 February 2007. They met on 21 March in order to assess the outcome of the interviews of the candidates and the possibility of granting an exceptional extension of the complainant's appointment. However, it appeared that not all the shortlisted candidates had been interviewed by the same panel; two candidates, who were on the Commission's roster, had been added to the list of shortlisted candidates after the initial round of interviews had been conducted even though they had been interviewed by a different panel. Since the Note of

19 September 2005 provides that all candidates should be interviewed by the same panel, the Personnel Advisory Panels adjourned the meeting.

The complainant's director notified the Personnel Section on 23 May 2007 that he could not identify an overriding justification for an exception because of the need to retain essential expertise or memory. Consequently, he did not recommend an exceptional extension of the complainant's appointment. On 25 May 2007, after all the candidates had been interviewed by the same panel, the Personnel Advisory Panels reconvened. They assessed the outcome of the interview results and the possibility of granting an exceptional extension to the complainant due to the need to retain essential expertise or memory. In their report of 25 May the members of the Personnel Advisory Panels unanimously held that, having considered the interview results, the supporting documentation on the external candidates and on the complainant as well as the division director's proposal, they supported the latter's recommendation to offer the post to one of the external candidates.

By a memorandum of 26 May 2007 the complainant was informed that the Executive Secretary had decided that there was no basis for granting her an exceptional extension and that her fixed-term appointment would therefore not be extended beyond its expiry date of 28 November 2007. The complainant requested a review of that decision on 23 July 2007, but by a letter of 13 August the Executive Secretary maintained it. She filed an appeal with the Joint Appeals Panel on 7 September and amended her statement of appeal on 9 October; she challenged the decision not to grant her an exceptional extension on the grounds that the Note from the Executive Secretary of 19 September 2005 was unlawful and that the procedure regarding the interviews was flawed. She separated from service on 28 November 2007.

In the meantime, on 25 October 2007, the complainant filed an application to intervene in the case leading to Judgment 2763. In that judgment the Tribunal ruled that, to the extent that the complaint was dismissed, the application to intervene must also be dismissed. To the

extent that the complaint was allowed, there was nothing to suggest that she was in the same position in fact and in law as the then complainant. It followed that her application to intervene was dismissed.

In its report of 23 January 2009 the Joint Appeals Panel held that the practice of adding candidates from the roster after the interviews of the shortlisted candidates had been conducted was inconsistent with the wording of Administrative Directive No. 20 (Rev.2) and with the spirit of the recruitment process as set out in the Directive. It considered that the recruitment process had to be followed in order to ensure fairness and transparency. In its view, the fact that the members of the Personnel Advisory Panels had met on two separate occasions could give rise to the impression that the incumbent had been assessed twice against the general market, which was not foreseen either by Administrative Directive No. 20 (Rev.2) or by the Note of 19 September 2005. The proper procedure would have been to re-advertise the position after the first round of interviews had not produced a suitable candidate. The Joint Appeals Panel therefore concluded that the recruitment process was flawed and recommended that the decision not to grant the complainant an exceptional extension be set aside and that she be awarded material damages in an amount equivalent to nine months' salary and allowances, less any amount she had earned in the first nine months following her separation from service. It rejected her request for moral damages.

By a letter of 23 February 2009 the Executive Secretary notified the complainant that, with the exception of its finding regarding her claim for moral damages, he had decided not to endorse the Joint Appeals Panel's recommendations. In his view, the delivery of Judgment 2763 in which the complainant was an intervener rendered her appeal irreceivable insofar as it breached the principles of double jeopardy and *res judicata*. On the merits, he considered that some of the assumptions of the Joint Appeals Panel were manifestly fallacious, particularly the assumption that once interviews had been conducted in respect of external candidates the Commission had no right to continue its effort to find a suitable candidate for the post concerned, and the assumption that candidates on the Commission's roster are not part of

the “general job market” within the meaning of the Note of 19 September 2005. That letter is the impugned decision.

B. The complainant submits that her complaint is receivable and that the principles of double jeopardy and *res judicata* do not apply, contrary to the Executive Secretary’s statement in the impugned decision. She argues that the principle of double jeopardy applies in criminal matters or as a general principle of law to prevent organisations from imposing on a staff member two penalties for the same disciplinary offence. The present case clearly does not fall under these considerations. The complainant also argues that the principle of *res judicata* does not apply since the cause of action in her complaint differs from that under review in the proceedings leading to Judgment 2763. Indeed, the Tribunal dismissed her application to intervene on the grounds that she was not in the same situation in fact and in law as the complainant. She adds that, in its submissions to the Joint Appeals Panel, the Commission raised no objection to receivability although it received the application to intervene on or about 30 October 2007, that is to say before it filed its reply with the Joint Appeals Panel on 10 December.

The complainant contends that, in failing to follow its own rules with regard to the filling of the position of Associate Analyst, the Commission acted in breach of its duty of good faith and that, on this ground, she should be awarded moral damages. In her view, it was against the principles of due process, equal treatment and fairness to consider new candidates several months after the first round of interviews had occurred. According to the Note of 19 September 2005, the recruitment process must comply with sections 1 and 2 of Administrative Directive No. 20 (Rev.2), which require a once-through process for testing the general job market. Thus, it may be assumed that, once the closing date for receipt of applications for a vacant post has passed, the Personnel Section carries out a first screening of the applications and sends them to the division director, who reviews them and draws up a shortlist of suitable candidates for

interview. Then the Personnel Advisory Panels are established. Interviews are conducted and the director of the division concerned makes a proposal regarding the possibility of granting an exceptional extension to the incumbent. Once the Panels have received the division director's proposal, its members meet again to decide whether to recommend the incumbent for exceptional extension or to recommend a shortlisted candidate for the post. The complainant submits that, in substance, the Commission engaged in two separate recruitment exercises, which is contrary to the spirit of the above-mentioned Directive and Note. Indeed, after the initial round of interviews that yielded no qualified candidate, the Administration identified two new candidates from the roster without re-advertising the post. These individuals were interviewed by the Personnel Advisory Panel, which had to reconvene to assess the merits of all the candidates. The complainant points out that the Tribunal's case law prohibits organisations from giving consideration to applications submitted after the closing date specified in the vacancy announcement. According to the complainant, identifying additional candidates after the first round of interviews has been conducted is tantamount to allowing late applications.

She also alleges that the internal appeal proceedings were tainted by breach of due process insofar as the Administration withheld relevant documents without giving her reasons for doing so. She was thus prevented from proving some of her allegations. In addition, the Joint Appeals Panel requested clarification from the Commission regarding the reasons for the adjournment of the first meeting of the Personnel Advisory Panel and she should have been provided with the Commission's supplemental submissions in that respect.

The complainant asks the Tribunal to set aside the impugned decision and to award her material damages in an amount equivalent to the salary and benefits she would have earned had her contract been extended for three years, plus interest. She also claims moral damages in the amount of 25,000 euros and costs in the amount of 10,000 euros.

C. In its reply the Commission contends that the complaint is irreceivable under the principle of *res judicata* given that the complainant was an intervener in Judgment 2763, which also dealt with a refusal to grant an exceptional extension of appointment beyond seven years of service. Also, it points out that the principle against double jeopardy prevents the Commission from being put in jeopardy of defending itself more than once for the same administrative decision. It explains that the complainant informed the Joint Appeals Panel on 4 January 2008 that she had decided not to submit a rejoinder and that Judgment 2763 was delivered on 9 July 2008; consequently, the Commission could not have raised that issue in the internal appeal proceedings leading to the present complaint.

The Commission stresses that, in accordance with Staff Regulation 4.4, a fixed-term appointment may be extended or renewed at the discretion of the Executive Secretary and that such an appointment shall at no time be deemed to carry any expectation of or right to extension or renewal. Consequently, the complainant had no right to be granted an extension, and *a fortiori* an “exceptional extension” of her fixed-term appointment beyond its expiry date. The fact that a staff member has essential expertise or memory needed by the Secretariat is an “indispensable condition” for him or her to be considered for an extension beyond the maximum period of service of seven years, but it is not a “conclusive condition” that gives him or her a right to such an extension. Indeed, the Executive Secretary must also bear in mind the non-career nature of the Commission in deciding to grant an extension; a condition that is laid down in Staff Rule 4.4.01(c). It adds that paragraph 4.2 of Administrative Directive No. 20 (Rev.2) provides that exceptional extensions shall be kept to an absolute minimum compatible with the efficient operation of the Secretariat.

The defendant rejects the allegation of breach of good faith. It explains that the essence of a fair recruitment process lies in ensuring that all candidates, including external ones and those who may be identified from the roster, are interviewed by one and the same panel

before the director of the division concerned makes his proposal in respect of a possible exceptional extension of the incumbent's appointment. It is only subsequently that the members of the Personnel Advisory Panels meet in a joint session to recommend, in light of the round of interviews and the information on the incumbent, whether the latter should be granted an exceptional extension or whether one of the candidates interviewed should be offered the position. It asserts that, in the case at hand, the procedure described above was followed in "all its essential and relevant sequential particulars" and argues that the complainant's assertions to the contrary are unsupported by the facts. In any event, the person selected was not one of the candidates that the Administration identified from the roster on its own initiative during the recruitment process.

The Commission denies any breach of due process explaining that the complainant's request for documents was vague as she asked for "all documents" related to the decision not to extend her fixed-term appointment beyond its expiry date. The Administration did provide her with the documents which it considered, in good faith, to be relevant. It nevertheless acknowledges that the Joint Appeals Panel had sought and received additional information from the Administration as to the reasons why the Personnel Advisory Panel had met twice. The Commission concedes that these documents should have been forwarded to the complainant but argues that she suffered no injury given that, based on that information, the Joint Appeals Panel made findings adverse to the Commission.

D. In her rejoinder the complainant maintains her pleas. She specifies that she is not raising the same arguments as those rejected by the Tribunal in Judgment 2763.

She states that she has never claimed that she had an automatic right to extension but rather that the Commission did not follow the procedure laid down in the Note of 19 September 2005 in deciding not to extend her appointment. In her view, the fact that the defendant did not follow that procedure prejudiced not only her but also the external applicants who filed their applications in a timely manner. She adds that, contrary to the requirements of Administrative

Directive No. 20 (Rev.2), the two candidates selected from the roster were identified by the division director and not by the Personnel Section.

E. In its surrejoinder the Commission maintains its position in full. It asserts that paragraph 1.8 of Administrative Directive No. 20 (Rev.2) does not provide that only the Personnel Section may identify suitable candidates from the roster.

### CONSIDERATIONS

1. The complainant joined the Provisional Technical Secretariat of the Commission under a three-year fixed-term contract on 1 December 2000. After two successive extensions her contract was set to expire on 28 November 2007.

2. Pursuant to Administrative Directive No. 20 (Rev.2) and the Note from the Executive Secretary of 19 September 2005, setting out a system for implementing the seven-year tenure policy, on 19 October 2006 a vacancy announcement for the complainant's post was issued. On 22 February 2007 the Personnel Section sent the Executive Secretary a memorandum it had received from the complainant's division director which contained the names of three shortlisted candidates to be interviewed for the complainant's post. By a memorandum dated 28 February 2007 the Executive Secretary appointed the members of the Personnel Advisory Panels.

3. The division director sent the Chief of Personnel Section two memoranda dated 20 March 2007; in one he recommended against offering the complainant an exceptional extension of her contract, and in the other he proposed that two candidates from the roster of previously interviewed applicants be added to the shortlist for the complainant's post. The memorandum regarding the two candidates

was forwarded to the Executive Secretary for approval on 23 March 2007. Meanwhile, the Personnel Advisory Panels met on 21 March and adjourned because it then emerged that not all shortlisted candidates had been interviewed by one and the same panel. By a memorandum dated 23 May 2007 to the Chief of Personnel Section the division director reiterated his recommendation not to grant an exceptional extension of the complainant's contract. The text of the memorandum was identical to that of 20 March.

4. The Chief of Personnel notified the complainant, in a memorandum dated 26 May 2007, that the Executive Secretary had decided there was no basis for granting her an exception to the seven-year service limitation and that her fixed-term appointment would indeed expire on 28 November 2007 in accordance with the terms of her contract. By a letter dated 13 August 2007 the Executive Secretary denied the complainant's request of 23 July for a review of that decision. On 7 September 2007 the complainant lodged an appeal with the Joint Appeals Panel requesting that the decision not to extend her contract be set aside and on 25 October 2007 she filed an application to intervene in the case which led to Judgment 2763.

5. In a memorandum dated 23 January 2009 to the Executive Secretary the Joint Appeals Panel recommended that:

“2.1 the decision be set aside not to grant the [complainant] an exceptional extension of her appointment beyond the seven-year limitation of service established by Administrative Directive No. 20 (Rev.2) based on a procedural flaw. The Panel considered that once the first round of interviews had not produced any suitable candidate, the proper procedure would have been to readvertise the position. It would then have been open to the Administration, should it have so wished, to add candidates from the ‘roster’ as part of this new recruitment process. The flaw was aggravated by the fact that the [Personnel Advisory Panel] met on two separate occasions, which could give rise to the impression, even if this were erroneous, that the incumbent had been assessed twice against the general job market, which was not foreseen either by

- Administrative Directive No. 20 (Rev.2) or by the Note from the Executive Secretary;
- 2.2 in view of the time that has elapsed, the [complainant] be paid compensation for the material damage suffered, equivalent to nine month[s'] salary and allowances based on her last salary, deducting any amounts she earned in the first nine months following separation from service;
  - 2.3 the request for moral damages be rejected; and
  - 2.4 the [complainant] be paid for the costs of the appeal upon production of evidence of what the costs were."

6. In a letter dated 23 February 2009, which is the decision impugned before the Tribunal, the complainant was notified that the Executive Secretary was maintaining his decision to allow her fixed-term appointment to expire on 28 November 2007. In that letter the Executive Secretary considered that Judgment 2763, which was delivered "on 9 July 2008, that is, subsequent to the closing of pleadings relating to [the complainant's] Appeal, rendered [that] Appeal irreceivable on two grounds, namely, the violation of the principle of double jeopardy and the principle of **res judicata**" (original emphasis). Regarding the merits of the complainant's appeal, the Executive Secretary stated that the queries raised by the Joint Appeals Panel were essentially based on two implicit manifestly fallacious assumptions, "namely (i) that once interviews have been conducted in respect of external applicants for a post, the Commission has no right to continue its effort to find a good candidate for the post concerned, even if the Executive Secretary deems that to be in the best interest of the Commission; and (ii) that candidates on the Commission's roster do not form part of the 'general job market' within the meaning of the Executive Secretary's Memorandum of 19 September 2005".

7. The complainant requests the Tribunal to: (a) set aside the impugned decision; (b) award material damages in an amount equivalent to what she would have earned if her contract had been

extended for a period of three years, including all salaries, allowances, emoluments and entitlements, plus interest from due dates; (c) award 25,000 euros in moral damages; and (d) award 10,000 euros in costs for the appeal before the Tribunal.

8. The complainant challenges the Commission's claim that her complaint is irreceivable on the basis of *res judicata* and double jeopardy. She submits that the Commission had ample opportunity to contest the receivability of her internal appeal on those grounds but as it failed to do so, it cannot now claim that her appeal was rendered irreceivable by the delivery of Judgment 2763, which was issued approximately six months prior to the date on which the Joint Appeals Panel issued its report. She further submits that the principles of double jeopardy and *res judicata* do not apply. So far as concerns *res judicata*, she states that she is "alleging very different facts in her appeal to demonstrate a breach of procedures, i.e. that the Commission considered late applications", and that the "foundation [of] the claim in law" was different and not decided in the said judgment. The complainant claims that there was a procedural flaw, that she was harmed materially by the loss of the opportunity to have her contract extended, that the denial of her requests for disclosure of documents and information pertinent to her case entitles her to moral damages, and that she is entitled to a reasonable award of costs. She further asks for oral hearings.

9. As the materials submitted by the parties are sufficient for the Tribunal to reach an informed decision, the application for an oral hearing is denied. So far as regards *res judicata*, the Commission observes that the complainant intervened in the case which led to Judgment 2763 while her 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 put forward in her application to intervene. 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 applications 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 complaint presently before the Tribunal is confined to factual and legal issues which are different from those decided in that case. It should be noted that the Tribunal rules on the basis of the specific claims against an administrative decision in a particular complaint, which means that if an alleged flaw is found not to have existed, that is not to say that the administrative decision was lawful and that no flaw exists which could be contested in a new complaint within the established time limits. Accordingly, the Tribunal rejects the argument based on *res judicata*. It also notes that the argument based on double jeopardy has no relevance to these proceedings.

10. On the merits of the case, the complaint is founded. 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, given that at

the request of the division director, two candidates were added to the shortlist after the interviews and evaluation of candidates from the original shortlist – established in late February 2007 – had taken place and after the division director had made his initial recommendation not to offer the complainant an exceptional extension of her contract. It appears 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. 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 also complies with 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 candidates to the shortlist after the evaluation process had begun. As that is enough to vitiate the decision, the Tribunal finds it unnecessary to examine the complainant's arguments regarding other alleged flaws.

13. The complainant requests material damages equivalent to what she would have earned if her 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 she lost a valuable opportunity to have her 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 she would have earned had her appointment been extended for nine months from 29 November 2007. The Tribunal also awards the complainant moral damages in the amount of 10,000 euros for the flawed decision as well as for the Commission's serious breach

of her right to access documents and information pertinent to her case. It finds, however, that the complainant has not established lack of good faith on the part of the Commission. 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, her claim for moral damages on this ground is dismissed. The complainant is entitled to 6,000 euros for costs related to her 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 nine months’ salary, allowances and other benefits based on the amount that she would have earned had her appointment been extended for nine months from 29 November 2007.
3. It shall pay her 10,000 euros in moral damages.
4. It shall also pay her 6,000 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