

**114th Session**

**Judgment No. 3172**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms S. K. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom, hereinafter “the Commission”) on 17 September 2010 and corrected on 21 December 2010, the Commission’s reply dated 14 March 2011, the complainant’s rejoinder of 16 June and the Commission’s surrejoinder of 22 July 2011;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, an Austrian national born in 1960, joined the Provisional Technical Secretariat of the Commission in February 2003 as a temporary assistant at grade G-3. In May 2003 she was appointed as a secretary in the Legal and External Relations Division, at grade G-4, under a fixed-term appointment which was extended several times. As from February 2004, she worked in the International

Data Centre (IDC) Division, where she was initially assigned to the Office of the Director. In December 2005 she was reassigned to the Waveform Monitoring Section and in February 2007 to the Network and Data Systems Operations Section.

By a letter of 19 November 2008 the complainant was offered a one-year extension of her appointment, from 5 May 2009 to 4 May 2010, in the Monitoring and Data Analysis Section of the IDC Division. She accepted the offer but indicated that she reserved her right to “come back on this issue”, as she considered that the offer was not in line with the Commission’s practice of renewing appointments for a period of two years. On 2 March 2009 she was reassigned to the Automatic Processing Systems Section in the same division.

By a memorandum of 16 October 2009 the Director of the IDC Division informed the Executive Secretary that, in order to implement the recommendation of Working Group B – a subsidiary body of the policy-making organs – to increase the number of data analysts holding grade P-2 or P-3, he proposed amongst other things to abolish two posts in his Division, one of which was the complainant’s post. The Executive Secretary approved this proposal and, on 4 November, the Director of the IDC Division wrote to him recommending that the complainant’s appointment should not be renewed upon its expiry, in order to free funds for the new data analyst posts. He explained that the complainant’s tasks could be distributed amongst other administrative staff. That same day, the Executive Secretary endorsed the recommendation. Thus, on 5 November 2009, the Personnel Section sent a memorandum to the complainant informing her that the Executive Secretary had decided to abolish her post in order to finance new data analyst posts and that, consequently, her appointment would not be extended beyond its expiry date of 4 May 2010.

On 12 November 2009 the complainant wrote to the Executive Secretary requesting him to review that decision, explaining that, based on her experience, she could be transferred to another post within the Commission. By a letter of 11 December the Executive Secretary replied that he had decided to maintain his decision. In the

meantime the complainant wrote to the Director of the Division of Administration asking to be reassigned to a G-4 post of secretary in that Division, which was advertised on the Commission's website. The Executive Secretary replied on 14 December encouraging her to apply for the post so that her candidature could be considered along with other applications.

On 8 January 2010 the complainant filed an appeal with the Joint Appeals Panel, challenging the decision not to extend her appointment. She argued that the Executive Secretary had failed to consult a Personnel Advisory Panel before taking it, as required by Administrative Directive No. 20 (Rev.2), which establishes the policies and procedures applicable to recruitment, appointment, reappointment and tenure of staff. She also argued that a Personnel Advisory Panel should have been consulted with respect to the decision to abolish her post, in accordance with Staff Rule 9.1.01(a), which provides that the Executive Secretary shall not terminate the appointment of a staff member in the case of abolition of post, reduction of staff, unsatisfactory services or incapacity for further service, until the matter has been considered by a Personnel Advisory Panel established in accordance with Staff Rule 4.1.01. The complainant alleged that the decision to abolish her post was tainted with bias, prejudice and abuse of authority, and that she had been humiliated and harassed by several colleagues in the IDC Division, which had adversely affected her health. She further alleged bad faith on the part of the Commission, given that it decided to advertise a G-4 position for which she was qualified, instead of transferring her to that position. Therefore, she asked that the decision not to extend her contract be set aside, and she claimed reinstatement, material and moral damages as well as legal costs.

In its report of 22 July 2010 the Joint Appeals Panel considered that the provisions of Administrative Directive No. 20 (Rev.2) concerning reappointment were not applicable because the complainant's post had been abolished and consequently reappointment was impossible. The Executive Secretary was therefore not required to consult a Personnel

Advisory Panel before deciding not to extend her appointment. In the Panel's view, Staff Rule 9.1.01(a) was likewise inapplicable because the complainant's appointment had not been terminated before its expiry date. It also found that the Commission had acted in good faith, noting in particular that it had given the complainant six months' notice and that both the decision to abolish her post and the decision not to extend her appointment had been taken on objective grounds. The Panel found no evidence of harassment, abuse of authority, prejudice, or bad faith, but it considered that the Administration had not adequately explained to the complainant the rationale for the one-year extension of her appointment, instead of two years, nor the basis for her numerous "reassignments", which had resulted in her being confused as to the administrative actions taken in her respect. Consequently, the Panel recommended dismissing the appeal but awarding her 5,000 euros in moral damages, plus costs.

By a letter of 23 August 2010 the Executive Secretary informed the complainant that he had decided to dismiss her appeal. Hence, the decision not to extend her appointment was maintained, and he rejected the Joint Appeals Panel's recommendation to pay moral damages and costs on the grounds that his decision was a legitimate, valid and reasoned management decision. That is the impugned decision.

B. The complainant alleges that the decision not to extend her appointment was procedurally flawed. She argues that the decision amounted to a termination of appointment for abolition of post and that, according to Staff Rules 4.1.01 and 9.1.01(a), the Executive Secretary should have consulted a Personnel Advisory Panel before taking his decision. In her view, the Commission also failed to follow the requirements of Administrative Directive No. 20 (Rev.2) concerning reappointments.

She questions the rationale for the decision to abolish her post, stressing that, according to Staff Regulation 9.1, the Executive Secretary may terminate an appointment "if the necessities for the service require abolition of the post or reduction of the staff". She

indicates that, while she was informed in November 2009 that her post would be abolished for financial reasons, a vacancy announcement was issued in December 2009 concerning a new G-4 post of secretary in the Division of Administration. Hence, the abolition of her post did not result in a reduction of the number of staff, which, according to the Tribunal's case law, is a prerequisite for considering that a decision to abolish a post was taken on objective grounds. She adds that, even if she had no right to a transfer, good faith would have required the Commission to maintain close contact with her and bring to her attention other possible assignments or vacancies. Indeed, according to the case law, an organisation has a duty to explore all possible options prior to the separation of a staff member whose appointment is not extended.

According to the complainant, she was not treated with dignity and respect at all times in her career, culminating in the decision to abolish her post and let her appointment expire. As a result she suffered from "panic attacks, sleeplessness, anxiety, depression and related physical symptoms". She emphasises that the Joint Appeals Panel recommended awarding her moral damages on the grounds that insufficient care had been taken by the Administration to ensure that all proper procedures were followed and that the personnel actions taken with respect to her numerous transfers or reassignments were duly explained to her. In this regard she asserts that she was transferred to a new position in February 2007 without being consulted, that her letter of appointment was not amended to reflect her new duties, that her transfer was not announced as required by applicable rules and that no explanations were given in her last letter of extension of appointment for departing from the "normal practice" of granting a two-year extension. She contends that the decision to extend her appointment by one year only was taken because of negative comments made in her performance appraisal report for the period 5 May 2007 to 4 May 2008.

Lastly, the complainant states that the Joint Appeals Panel requested the Administration to provide information concerning the Personnel Advisory Panel that recommended the one-year extension,

but the Administration refused to comply with this request. In her view, that refusal constitutes a breach of due process for which she is entitled to claim moral damages.

The complainant asks the Tribunal to set aside the impugned decision, to order the Commission to reinstate her with retroactive effect from the date of her separation and to pay her moral damages. She seeks material damages in an amount equivalent to the salaries, emoluments and benefits she would have earned, together with interest from due dates, had she not separated from service until the date of her reinstatement. She also claims costs.

C. In its reply the Commission contends that the complaint is irreceivable for failure to exhaust internal means of redress insofar as it challenges the lawfulness of the decision to abolish the complainant's post. In any event, it submits that that decision was taken for objective reasons, i.e. the need to maximise the impact of the limited resources at the disposal of the Commission and to respond to the recommendation of Working Group B.

The Commission denies any procedural irregularities in the decision-making process that led to the Executive Secretary's decision not to extend the complainant's appointment upon expiry. It points out that she held a fixed-term appointment which, according to Staff Regulation 4.4, may be extended or renewed at the discretion of the Executive Secretary, if the staff member is willing to accept such extension or renewal. At no time, however, shall such an appointment be deemed to carry any expectation of or right to extension or renewal. It adds that, according to Staff Rule 4.4.01(c), "[i]n granting fixed-term appointments, the Executive Secretary shall bear in mind the non-career nature of the Commission". Consequently, the Executive Secretary was entitled to decide, in the exercise of his discretion, that it was in the best interest of the organisation not to extend the complainant's appointment. It stresses that her appointment was not terminated but merely expired in accordance with its terms, and that the Director of the IDC Division had not made a proposal for extending it but rather proposed not to extend it. Consequently,

it denies any breach of Administrative Directive No. 20 (Rev.2), pointing out that, under paragraph 3 of the Directive, only proposals for a possible extension of a fixed-term appointment must be submitted to a Personnel Advisory Panel for a recommendation.

The Commission denies the allegations of bad faith and breach of due process with respect to the refusal to disclose information to the Joint Appeals Panel, explaining that the request for disclosure related to an earlier administrative decision which was not the subject of the appeal under consideration. The refusal was based on the genuine conviction that the Panel had “gone out of bounds” in making that request. It firmly denies that the complainant’s alleged health problems were work-related.

D. In her rejoinder the complainant contends that her complaint is receivable in its entirety, stressing that the decision to let her appointment expire was based on the simultaneous decision to abolish her post as set forth in the memorandum of 5 November 2009, and that she asked the Executive Secretary to review both decisions in her letter of 12 November 2009.

On the merits, she submits that there is no provision in Administrative Directive No. 20 (Rev.2) permitting a waiver of its terms where the Commission wishes to end an appointment by allowing it to expire. She maintains that the financial constraints alleged to justify the abolition of her post were a mere pretext, pointing to an e-mail of 3 May 2010 by which the Executive Secretary directed the Director of the Division of Administration to “add one more [General Service-grade] post for IDC”, the division in which she used to work. She maintains that the Commission showed bad faith towards her, and alleges that the Chief of the Personnel Section told another organisation, with respect to her application for a vacant post, that she was not reliable as she was often on sick leave. She adds that since her separation from service she has been unable to find comparable employment and that, owing to significant and continuing emotional distress caused by her circumstances, she had to resign from her last short-term position with another organisation.

E. In its surrejoinder the Commission maintains that the complainant did not follow proper internal appeal procedures with respect to the decision to abolish her post. It asserts that in the letter of 12 November 2009 she only requested a review of the decision not to extend her fixed-term appointment. Moreover, the Joint Appeals Panel clearly stated in its report that it considered that the appeal was directed against the decision of 5 November 2009 not to extend the complainant's appointment and the Executive Secretary in his final decision of 23 August 2010 decided to uphold that decision.

The defendant contends that the complainant's argument based on "waiver" of the provisions of Administrative Directive No. 20 (Rev.2) is misconceived, as it wrongly implies that the Directive contains a provision requiring the Commission to refer cases of non-extension of appointment upon expiry to a Personnel Advisory Panel. It reiterates that paragraph 3 of the Directive merely provides that cases of possible reappointment should be referred to such a panel for recommendation.

#### CONSIDERATIONS

1. The complainant served the Commission as a General Service staff member (grades G-3 and G-4) from 2003 until her last fixed-term contract expired on 4 May 2010. In 2008 the Administration offered the complainant a one-year extension of her fixed-term appointment with a termination date of 4 May 2010 and no expectation of renewal. Although she accepted the offer, the complainant regarded this as an insulting departure from the Commission's normal practice of offering two-year extensions.

2. Over the years, and particularly in 2005, the complainant had some unpleasant dealings with various management officials and other staff members. Also, the Commission reassigned the complainant a number of times and, on at least one occasion, without formal personnel action.

3. In October 2009 the Director of the IDC Division, acting on a recommendation from the Commission's Working Group B, recommended the abolition of the complainant's post to accommodate the creation of posts for additional Professional-grade data analysts. The Executive Secretary approved that recommendation in November, and the complainant was notified that in view of the post abolition the Commission would not extend her appointment beyond its expiry date of 4 May 2010.

4. The complainant sought the Executive Secretary's review of the decision not to extend her appointment, without success. She lodged an internal appeal alleging that the decision breached the Staff Regulations and Rules as well as Administrative Directive No. 20 (Rev.2), and was taken for an improper purpose. The Joint Appeals Panel found that the contested administrative actions were in keeping with applicable rules. For want of affirmative evidence demonstrating bad faith, it also rejected the complainant's submissions in that regard. However, the Panel recommended that the Commission pay the complainant moral damages as compensation for its systematically lax approach to personnel decisions involving her and that it pay her legal costs.

5. During the internal appeal proceedings, the Joint Appeals Panel twice requested documentary records related to the 2008 decision to offer the complainant a one-year rather than a two-year extension of her appointment. The Commission refused to comply with the Panel's requests stating that the records were irrelevant to the matter properly under consideration, that is, the 2009 decision to allow the complainant's contract to expire by its terms. The complainant alleges that by refusing to produce these records the Administration deprived her of the right to due process and it did so in bad faith.

6. The Executive Secretary delivered his final decision on 23 August 2010 – which is impugned before the Tribunal – adopting the Joint Appeals Panel's conclusion that the decisions to abolish the

complainant's post and not to extend her appointment were lawful but rejecting its recommendation that the Commission pay her moral damages and costs.

7. The Commission concedes that the complaint is receivable insofar as it relates to the decision not to extend the complainant's fixed-term appointment. All other claims, it maintains, are irreceivable for want of compliance with Article VII of the Statute of the Tribunal. This will be dealt with later in these considerations.

8. The first issue is whether the Executive Secretary's decision not to extend the complainant's appointment complied with Staff Rule 4.1.01 and Administrative Directive No. 20 (Rev.2).

9. The complainant relies on the Tribunal's observations about Administrative Directive No. 20 (Rev.2) in Judgment 2259, under 8. It reads in part:

"Under the terms of that Directive, proposals for reappointment must be forwarded by division directors to the Personnel Section accompanied by a justification and a performance appraisal report. The Personnel Section must circulate the proposals to the members of a Personnel Advisory Panel, which submits recommendations for decision to the Executive Secretary."

She states that in her case this was not done.

10. The complainant also takes the position that Administrative Directive No. 20 (Rev.2) applies to decisions not to extend an appointment occasioned by the abolition of a post. She maintains that the Tribunal dealt with precisely analogous circumstances in Judgment 2802 involving Administrative Directive No. 20 (Rev.2) and a Professional-grade CTBTO staff member who was not offered a contract extension because her post was slated to be discontinued. In Judgment 2802, under 14, the Tribunal stated:

"The complainant's right was to have the question of the possible extension of her contract considered on the basis of 'the need to retain essential expertise or memory in the Secretariat'. The discontinuance of her post was directly relevant to that question, as was the fact that it was

not intended to fill it when her contract expired – an intention which the Joint Appeals Panel found had been carried into effect.”

11. The complainant argues that in that case it appears the Commission accepted that Administrative Directive No. 20 (Rev.2) applied in circumstances of post abolition, yet, in her case, the Administration did not follow it. She contends that Administrative Directive No. 20 (Rev.2) exists to ensure that decisions not to extend appointments are taken on fair and objective grounds.

12. This argument must be rejected. Administrative Directive No. 20 (Rev.2) establishes the policies and procedures applicable to recruitment, appointment, reappointment and tenure of staff. As the Commission submits, Administrative Directive No. 20 (Rev.2) requires that proposals to extend fixed-term appointments be submitted to the attention of a Personnel Advisory Panel. However, the Directive creates no such obligation in circumstances where, as here, the Administration decides to allow a staff member’s contract to expire according to its terms.

13. The next issue is whether the Executive Secretary’s decision to allow the complainant’s appointment to expire complies with Staff Regulation 9.1 and Staff Rule 9.1.01(a). The complainant submits that, since the Administration was “not in a position to offer” her an extension, the expiry of her contract can be regarded under Staff Rule 9.1.01(b) as a “termination” engaging the Staff Rule 9.1.01(a) requirement that the matter be referred to a Personnel Advisory Panel. This argument is without merit. Staff Rule 9.1.01(b) specifically provides that the expiry of a fixed-term appointment is not a “termination” within the meaning of the Staff Regulations.

14. The next question is whether the decision to abolish the complainant’s post was vitiated by bias or bad faith, that is, if it was taken for an improper purpose. The Commission maintains that the administrative decision to abolish the complainant’s post, although taken simultaneously with the decision not to extend her appointment,

was not properly contested in the internal appeal and, accordingly, is irreceivable pursuant to Article VII of the Statute of the Tribunal.

15. The complainant's appeal, as the Joint Appeals Panel acknowledged, was against one specific decision, namely "the decision dated 5 November 2009 by the Executive Secretary not to grant [her] an extension of her fixed-term appointment beyond 4 May 2010 *due to the abolition of the post she occupied*" (emphasis added). Similarly, the Executive Secretary's impugned "final decision" was to "uphold [his] decision not to grant [the complainant] an extension of [her] fixed-term appointment beyond its expiry date of 4 May 2010 *due to the abolition of the post [she] occupied*" (emphasis added). The Commission adds that the complainant's arguments related to the decision to abolish her post constitute a new claim and not simply new pleas.

16. A decision taken for an improper purpose is an abuse of authority. It follows that when a complainant challenges a discretionary decision, he or she by necessary implication also challenges the validity of the reasons underpinning that decision. In this respect, the Tribunal may examine the circumstances surrounding the abolition of the post to determine whether the impugned decision was tainted by abuse of authority.

17. Having said this, the record amply shows that, although Working Group B did not specifically recommend the abolition of the complainant's post, the contested decisions were taken in the organisational interest for budgetary reasons and to serve a specifically identified programmatic need.

18. The next issue is whether the Administration's refusal to provide documents requested by the Joint Appeals Panel constitutes a breach of due process. Twice during the internal appeal proceedings the Panel requested additional information regarding the decision of 2008 to offer the complainant a one-year extension of her appointment rather than the two years normally offered. Among other things, it

wanted to know who was the chairperson of the Personnel Advisory Panel that recommended the truncated extension. The Administration twice refused to comply with these requests, citing relevance.

19. The complainant contends that the refusal of the Administration to produce this documentation or identify potential witnesses breached her due process rights. It did so, moreover, in bad faith and in breach of a fundamental principle of justice identified by the Tribunal in Judgment 2282, under 11:

“The integrity of the internal appellate process is of fundamental importance to the proper functioning of the international civil service. [...] it must be free of any taint of fraud or abuse of power. [...] there is a positive obligation on the part of the administration of every international organisation to assist staff in the exercise of their recourse and to place no obstacle in their way.”

20. The complainant asks the Tribunal to draw a negative inference from the Commission’s refusal to produce the documents the Joint Appeals Panel requested, and to award moral damages for the breach of due process.

21. In response, the Commission relies on its statement of 20 May 2010 to the Joint Appeals Panel. It reads in part:

“[t]he Administration wishes to state that the decision in respect of which the Panel is requesting additional material is not one which [the complainant] has challenged or in any way requested its review pursuant to the applicable provisions. Moreover, the Panel will note that [the complainant] herself has in no way alleged that the abovementioned decision has violated the terms of her appointment.”

22. The Commission adds that the refusal was in no way predicated on bad faith, but rather on a genuine conviction that the Panel’s request exceeded its jurisdiction.

23. Pursuant to Article 11 to the Staff Regulations and Rules, the Joint Appeals Panel is the judge of its own competence and is entitled to inspect all documents pertinent to the cases that come before it. The Commission did not assert that the documents in question were

privileged; rather, it took the position that they were irrelevant. Relevance, though, is clearly a question for the Panel to decide, not the litigants who come before it.

24. The Staff Regulations and Rules do not require the Joint Appeals Panel to explain why it considers a given document to be relevant. However, in this case, the Panel did explain both in its memorandum to the Administration and in its formal recommendation to the Executive Secretary that the requested documents were relevant to the disputed question of whether the decisions to abolish the complainant's post and not to extend her appointment were tainted by bias or some other legally vitiating factor. By refusing to proffer the documents, even though this did not prevent the Panel from continuing the appeal and issuing its recommendation, the Commission breached the principles of due process, entitling the complainant to moral damages.

25. As to the allegation of bad faith, it is well established in the case law that "bad faith must be proved and is never presumed" (Judgment 2293, under 11). In this case, there is not a sufficient basis in the evidence to conclude that the refusal to produce the documents amounts to bad faith.

26. It remains to consider what may broadly be described as "harassment linked" allegations in support of an inference that the decision not to extend her appointment did not rest on organisational needs and the Joint Appeals Panel's recommendation of moral damages in this regard.

27. While the file record reveals that the complainant had various problems with management and other staff members during her tenure, her performance appraisal reports indicate that they were amicably resolved. The Tribunal finds that the Joint Appeals Panel overreached by considering prior personnel decisions involving the complainant that she did not contest in her statement of appeal. Unlike the decision to abolish her post, the prior personnel decisions did not

relate in any cognisable way to the Executive Secretary's decision to permit her contract to expire. The Tribunal concludes that the Joint Appeals Panel's recommendation for the payment of moral damages was based on administrative actions not properly at issue in the appeal.

28. In conclusion, the complainant will be awarded moral damages in the amount of 15,000 euros and, based on the partial success of her complaint, costs in the amount of 4,000 euros.

#### DECISION

For the above reasons,

1. The Commission shall pay the complainant moral damages in the amount of 15,000 euros.
2. It shall also pay her 4,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 2 November 2012, Mr Seydou Ba, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet