

116th Session

Judgment No. 3257

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. E. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom, hereinafter “the Commission”) on 6 July 2011 and corrected on 7 October, the Commission’s reply of 2 December 2011, the complainant’s rejoinder of 17 February 2012, and the Commission’s surrejoinder of 3 May 2012;

Considering Article II, paragraph 5, 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 was appointed as a Public Information Clerk at the G-5 level in the Commission’s Provisional Technical Secretariat (PTS) under a three-year fixed-term appointment commencing on 1 April 1997. On 1 April 2000 he received a two-year extension of his appointment, which was followed by four further extensions of the same duration up to 31 March 2010.

Referring to paragraph 3.2 of Administrative Directive No. 20 (Rev.2) which sets out the procedure to be followed concerning

proposals of possible reappointment, the complainant's Division Director wrote to the Personnel Section on 11 June 2009 recommending that he be reappointed given that his performance was satisfactory. He added that the most recent performance appraisal report would be forwarded to the Personnel Section. The complainant's mid-term and final appraisal for the period 1 April 2008 to 31 March 2009 were both finalised and signed by his immediate supervisor and his second-level supervisor, the new Division Director, on 8 September 2009.

By a letter of 16 September 2009 the complainant was offered a one-year extension of his appointment with effect from 1 April 2010. He was asked to sign and return the letter of acceptance within two weeks if he decided to accept the offer.

On 6 October 2009 the complainant requested the Executive Secretary to review that decision on the ground that no reason was given therein for offering him a one-year extension instead of the usual two-year extension. On that same day, the complainant requested the Director of Administration to provide him with all written documents related to the decision of 16 September 2009, including the recommendation of the Personnel Advisory Panel (PAP) regarding the extension of his contract as required by Administrative Directive No. 20 (Rev.2) of 8 July 1999 on recruitment, appointment, reappointment and tenure. Some of the requested documents were forwarded to the complainant on 14 October and in particular the PAP's report of 16 September 2009. The PAP recommended to the Executive Secretary to extend the complainant's contract by one year only because it was necessary to further assess whether his satisfactory performance was sustainable and reliable. It also recommended providing the complainant with relevant training and "coaching" during that period.

By an e-mail of 27 October the complainant was reminded by the Personnel Section that the deadline for the acceptance of the offer of extension was to expire on close of business on the following day, namely 28 October 2009. The complainant did not meet that deadline.

By a letter dated 4 November 2009 the Executive Secretary informed the complainant that he had decided to reject his request for review of 6 October, explaining that his decision to offer him a one-year extension was taken on the basis of the PAP's recommendations. He added that his contract would expire on 31 March 2010 since he had not accepted the offer for a one-year extension. The Executive Secretary indicated that the Personnel Section would assist the complainant during the separation process.

On 2 December 2009 the complainant informed the Chief of the Personnel Section of his acceptance of the offer of extension of appointment, and he explained that the delay in conveying his acceptance was due to him receiving the Executive Secretary's response to his request for review only on 4 November 2009. She replied on 10 December 2009 that, pursuant to the terms of the letter of extension dated 16 September 2009 and the Executive Secretary's letter of 4 November 2009, the offer of extension of appointment had lapsed and that consequently his contract would expire on 31 March 2010. On 21 December 2009 the complainant filed an appeal with the Joint Appeals Panel (JAP) to contest the decision of 4 November 2009, requesting that it be set aside and that he be granted a two-year extension of his appointment, as well as an award of 25,000 euros for the alleged breach of due process.

By a letter of 23 December 2009 the complainant requested the Executive Secretary to review the decision communicated to him on 10 December 2009, and to recognise the validity of his acceptance of the one-year offer of extension, based on the fact that he had received the Executive Secretary's decision on his request for review of 6 October 2009 only on 4 November. The complainant pointed out that the offer of extension did not conform to the notice period of six months required by paragraph 3.5 of Administrative Directive No. 20 (Rev.2). By a letter of 12 January 2010 the Executive Secretary rejected the request for review on the ground that the offer of extension of appointment contained in the letter of 16 September 2009 terminated as a direct consequence of the complainant's failure

to accept the offer within the clearly stipulated time period, and not by virtue of an administrative decision. He added that, in accordance with Staff Rule 11.1.02(c), the period of time to accept the offer was not suspended by the request for review submitted on 6 October 2009.

In its report of 17 March 2011 the JAP recommended an award of moral damages of 7,000 euros for the Administration's failure to provide the complainant with a timely explanation for the offer of a one-year extension and "the careless manner in which the report of the PAP was used as the basis for the offer". It recommended to pay his costs, in an amount not exceeding 5,000 euros, but to reject all other claims.

By a letter of 15 April 2011 the Executive Secretary informed the complainant that he had decided to endorse the JAP's recommendations to reject his request to set aside the decisions of 16 September 2009 and 4 November 2009 and grant him a two-year extension of his contract, as well as his request to be paid 25,000 euros. However, he decided not to follow the JAP's recommendation to award the complainant moral damages in the amount of 7,000 euros, on the ground that there was no legal basis for that recommendation. That is the impugned decision.

B. The complainant contends that the decision impugned is vitiated by procedural irregularities as well as errors of fact and law. He submits that the applicable procedures, as set out in Administrative Directive No. 20 (Rev.2), were not followed. He points out that on 16 September 2009, the Executive Secretary decided to extend his appointment by offering him a one-year extension, without having the benefit of the PAP's report, which he did not approve until some two weeks later. Therefore, the Executive Secretary misrepresented the facts when, in his letter rejecting the complainant's request for review, he wrote that his decision was taken "in light of the recommendations of the Personnel Advisory Panel". In the complainant's view, the JAP erred when it concluded that this error did not matter.

The complainant submits that the purpose of the Administrative Directive is to ensure that all the pertinent facts are taken into account

when a decision on reappointment is taken. The Executive Secretary took the decision without the benefit of the PAP report, and without the benefit of the complainant's Division Director's proposal accompanied by the complainant's performance appraisal reports, as required by Administrative Directive No. 20 (Rev.2). Moreover, there is no evidence that the Executive Secretary independently consulted any of the complainant's performance appraisals, which were consistently satisfactory. The complainant asserts that it is not acceptable for the JAP to conclude that a decision taken in breach of the applicable procedures is lawful so long as the rules are eventually followed. These errors of fact and law are, in his view, sufficient to vitiate the decision impugned.

The complainant also alleges violation of paragraph 3.2 of Administrative Circular No. 20 (Rev.2) which requires that the Division Director concerned provide a justification for the recommendation to extend a staff member's appointment. In his proposal for possible reappointment, the complainant's former Director recommended extending his appointment "due to satisfactory performance of his work", but did not indicate the length of the extension. The failure to justify the offer of a one-year extension rather than the usual two-year extension amounts to a breach of the Commission's duty to state reasons for a decision affecting the complainant's rights.

In addition, the Commission did not respect the procedures laid down in Administrative Directive No. 2 (Rev.3), entitled "Appraisal of the Performance of Staff Members", of 22 September 2005. The complainant points out that there were no regular meetings to provide feedback on areas of performance that were allegedly lacking. The last appraisal report was not completed in due time and no mid-term review was held during the reporting period. Moreover, the e-mail record shows that the complainant's supervisor was consistently praising his performance. The complainant's former Division Director separated from service before finishing his performance evaluation report, which was completed only on 8 September 2009, i.e. with three months' delay. If the Director was concerned about the complainant's performance, the failure to conduct a mid-term review constituted a

significant breach of the complainant's due process rights, since he was denied the opportunity to answer allegations of supposed deficiencies.

The complainant suspects that the PAP was advised by his new Division Director that his performance was not consistently satisfactory, because the reason the PAP cites to justify the one-year extension is "for the purpose of ensuring that [the complainant's] satisfactory performance is sustainable and reliable, for his development of strong interest in the mandate of public information and to enable his managers [to] build strong confidence in him". In his view, the PAP was not given all the facts, as it did not have all of his performance evaluation reports. Consequently, not only was he denied the opportunity to counter the concerns about his performance, but the procedure used was neither transparent, nor adversarial, as required by the Tribunal's case law.

Lastly, the complainant argues that the Personnel Section should have advised him that his acceptance of the one-year extension was without prejudice to his pending request for review. He considers that the Commission deliberately misled him and, therefore, that it acted in bad faith, by failing to act in a transparent manner. In his view, the haste with which the Commission acted and allowed his appointment to expire is evidence that the decision was, in effect, a hidden sanction for having contested the decision to extend his contract for one year only.

The complainant asks the Tribunal to set aside the impugned decision and to order his reinstatement as from 1 April 2010, including the payment of all salaries, emoluments, entitlements and benefits he would have received if his appointment had not ceased, with interest. At the very least, he claims all salaries, emoluments and benefits for the period from 1 April 2010 to 31 March 2012, with interest. He seeks moral and exemplary damages in the amount of 25,000 euros for the Commission's bad faith, as well as costs in the amount of 8,000 euros.

C. In its reply the Commission submits that the complaint is unfounded, as the decision to offer him a one-year extension of his fixed-term contract was not vitiated by any substantive or procedural flaw. It recalls that an extension of an appointment for a two-year duration is not mandatory under Administrative Directive No. 20 (Rev.2), rather, it is left at the discretion of the Executive Secretary. Paragraph 4.3 of the Administrative Directive clearly states that “[a]ppointments of a shorter duration may also be granted when the needs of the Commission so require”. This is also made clear in Staff Rule 4.4.01(a), which prevails over Administrative Directive No. 20 (Rev.2) and provides that fixed-term appointments may be granted for a period or periods not exceeding three years. The defendant therefore submits that the Executive Secretary had a sound legal basis for his decision to offer the complainant a one-year extension of his fixed-term appointment.

The Commission denies that the Executive Secretary signed the offer of a one-year extension without having the benefit of the PAP report as well as the JAP’s finding that the report was used in a “careless manner” as a basis for the Executive Secretary’s decision. It explains that the date of 16 September 2009 on the letter of extension of appointment which was hand-delivered to the complainant on 5 October 2009 should have been modified to read 30 September 2009, which is when the letter was actually signed by the Executive Secretary. However, this error caused no prejudice to the complainant, because the time limit for initiating internal appeal proceedings started to run on 5 October, the date on which he received the letter.

Further, the Commission points out that in making his proposal for extending his appointment, the complainant’s former Division Director was free not to specify the duration of the extension he was recommending, as paragraph 3.2 of Administrative Directive No. 20 (Rev.2) imposes no duty to do so. Moreover, the fact that the Director’s recommendation for an extension was made before the completion of the complainant’s last performance appraisal report could not have

caused him any harm given that the performance appraisal report which was the basis for the Director's recommendation was forwarded to the PAP before it made its own recommendation.

The Commission denies the complainant's allegation that it did not follow the correct procedures for the establishment of his last performance appraisal report, stressing that he indicated on that report that he had received adequate and regular feedback. It also submits that there is absolutely no basis for his claim that there was no mid-term review as the complainant signed the appraisal report in which it was indicated that several meetings were held during the period under review to discuss his performance. While it acknowledges that there was a delay in completing his last performance appraisal report, the Commission submits, as was also noted by the JAP, that this had no bearing on the decision to offer the complainant a one-year extension, and that this delay would not be sufficient to invalidate the procedure. It points out that there is no legal obligation to provide the PAP with all of the complainant's performance appraisal reports for the whole period of his service in the PTS.

As regards the complainant's allegation that his supervisor "implicitly advised" the PAP that his performance was not consistently satisfactory, the Commission argues that he has produced no evidence in support of it. In any case, it emphasises that the PAP was not acting as a rebuttal panel dealing with his performance appraisal reports and that the complainant did not initiate a rebuttal procedure in conformity with Administrative Directive No. 2 (Rev.3).

The Commission categorically denies the complainant's allegation of bad faith. The fact is that by 4 November 2009, when the Executive Secretary rejected the complainant's request for review, the latter had not accepted the offer of extension. It submits that the decision to extend the initial deadline for the complainant's acceptance of the offer of a one-year extension is proof of its good faith, especially when, as a matter of fact and law, it was under no obligation to do so.

The Commission argues that the complainant's claim of a "hidden sanction" is wholly unsubstantiated.

Lastly, the Commission argues that while the letter dated 16 September 2009 did not contain a justification, this was remedied by the letter of 4 November 2009, which did provide the complainant with the reasons for the decision to offer him a one-year extension. Referring to the Tribunal's case law, it submits that what matters in such a case is that the absence of a statement should not be to the staff member's detriment. As the prejudice alleged by the complainant occurred solely as a result of the normal expiration of his fixed-term appointment and his choice not to accept in good time an offer of extension, his prejudice is not attributable to any wrongdoing on the part of the Commission.

D. In his rejoinder the complainant presses his pleas. He maintains that his last performance appraisal report was completed by the new Division Director, who was not his second-level supervisor during the reporting period and thus was not familiar with his work. Concerning the Administration's explanation that the Executive Secretary did not in fact sign the letter of extension on 16 September, but purportedly waited until 30 September to sign it after having reviewed the PAP report, the complainant argues that the evidence provided is unconvincing and fails to understand why this was not advanced in the course of the internal appeal proceedings. The complainant points out that, contrary to the Commission's allegation, he did lodge a formal rebuttal of his last performance appraisal report. Moreover, he did not expect the offer to remain open for an indefinite period, merely that it would remain open until he received the reason for the decision to only offer a one-year extension.

E. In its surrejoinder the Commission maintains its position in full. It notes that the performance appraisal report in question was reviewed by a panel, which concluded that it was "independent and objective" and recommended that it be maintained in its original form.

CONSIDERATIONS

1. It is seen that the impugned decision before the Tribunal is that which was made by the Executive Secretary of the Commission. It was contained in a letter of 15 April 2011. His decision came out of the internal appeal to the JAP. The complainant appealed the decision of the Executive Secretary to offer him a one-year extension of his two-year fixed-term contract from 1 April 2010, rather than a two-year extension from which he had benefited from 1 April 2000. His appeal to the JAP prayed for an order setting aside the decision of the Executive Secretary and to grant him a two-year extension. He also prayed for 25,000 euros for breach of his right to due process, 25,000 euros in moral damages and costs.

2. The JAP rejected the complainant's request to set aside the Executive Secretary's decision as well as his prayer for the two-year extension of his contract. It also rejected his prayer for 25,000 euros for the breach of his right to due process. The JAP however recommended that the complainant should be awarded 7,000 euros as a consequence of the Executive Secretary's failure to provide a timely explanation for its offer of a one-year extension of his contract and for the careless manner in which the report of the PAP was used as the basis of that offer. The JAP further recommended that the Commission should pay the complainant's legal costs not to exceed 5,000 euros upon his production of evidence of the actual costs incurred.

3. In the impugned decision the Executive Secretary endorsed the JAP's recommendation not to grant a two-year contract extension to the complainant. The Executive Secretary also endorsed the JAP's recommendation not to pay 25,000 euros for breach of his right to due process. However, the Executive Secretary refused to follow the JAP's recommendation to pay the 7,000 euros in moral damages to the complainant and remained silent on its recommendation on costs.

4. No threshold issues arise for consideration. The Commission concedes that the Tribunal has jurisdiction to entertain the complaint. It also concedes that the complaint is receivable by the Tribunal under Article VII of its Statute. The merits of the complaint will therefore be considered.

5. In effect, the complainant's case is that the Commission erred when, without warning and without providing reasons, the Executive Secretary offered him only a one-year extension of his contract rather than the two-year extensions which he received over about a decade.

6. The terms under which the complainant was employed entitled him to the benefits of the Staff Regulations, Staff Rules and Administrative Directives of the Commission. The operation of these texts coupled with the Tribunal's case law govern the continuation, extension, non-renewal and termination of the employment of persons who are on fixed-term contracts. (See Judgment 1317, under 23, 24 and 28.)

7. It is opportune to reiterate at this juncture the consistent precedents of the Tribunal that the exercise of discretion to extend a fixed-term contract is subject only to limited review by the Tribunal. The Tribunal will only impeach a decision on an extension if the decision is tainted with a legal or procedural irregularity, if it is based on an error of fact or law or amounts to an abuse of authority or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence (see, for example, Judgment 1750, under 5, and Judgment 2850, under 6).

8. The JAP first considered whether there was an absence of justification for the Executive Secretary's offer of a one-year rather than a two-year extension of the complainant's contract. In so doing, it referred to Staff Regulation 4.4, which provides as follows:

“Staff shall be granted fixed-term appointments under such terms and conditions, consistent with the present Regulations, as the Executive Secretary may prescribe. A fixed-term appointment 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.”

9. The Tribunal considers that this provision puts the extension or renewal of a fixed-term contract within the discretion of the Executive Secretary and it provides that an appointment does not carry any expectation of or right to extension or renewal. The Tribunal also notes that paragraph 4.3 of Administrative Directive No. 20 (Rev.2) states that, on a fixed-term contract, a shorter extension may be awarded when the needs of the Commission so require.

10. The Tribunal further considers that the one-year extension which the complainant was offered was valid, but that, on the authority of Judgment 1617, under 2, the rules on notice were to be observed inasmuch as the extension which was offered was shorter than those from which the complainant previously benefited. The Tribunal however notes the further statement in Judgment 1617, under 2, that the need for notice is not as great when an appointment is actually extended, albeit for a shorter period than that of the current appointment.

11. The JAP dismissed the complainant’s contention that it was procedurally irregular that he received the notice letter on 5 October 2009, which was five days after he should have received it. The JAP found that that delay was too insignificant to constitute a miscarriage of justice. The Tribunal does not comment on the correctness of this finding, but observes that the complainant also challenged the decision of the Executive Secretary on the ground that the notice letter of 16 September 2009 provided no reasons for the decision. Although an explanation was provided in the Executive Secretary’s letter of 4 November 2009, that explanation came after the 28 October 2009 deadline by which the complainant was to accept the offer of the

one-year extension. It also came after the complainant requested a review of the Executive Secretary's decision for the one-year extension. These facts were significant as they highlight the need for reasons in this case because these circumstances impacted the complainant's ability to assess whether he should have accepted the offer of the one-year extension of his contract and whether he should challenge the decision.

12. It is also significant that the complainant was reminded of the deadline on 27 October 2009, when he had not yet received the explanation. Additionally, it was in the letter of 4 November 2009, which included the explanation, that the Executive Secretary informed the complainant that his contract would expire on 31 March 2010 because he had failed to accept the offer of extension. The Tribunal therefore finds that the decision to offer the one-year extension to the complainant was flawed by the failure of the Administration to provide a timely explanation for that decision.

13. Another issue that arose was whether there was procedural irregularity in the complainant's performance assessment exercise. Administrative Directive No. 2 (Rev.3) of 22 September 2005 provides the guidelines for the appraisal of staff members. In setting out the purpose for appraisals, the Directive refers to Staff Rule 4.2.01(a) which permits the establishment of an appraisal system. The statement therein is that the system of appraisal is to enable the Commission to make the best possible use of its human resources and to contribute to the development of individual staff members. To this extent, it states that such reports are to be regularly completed, be shown to the staff member for comment and form a part of his or her cumulative record. Paragraph 1.3 of the Directive states that, in addition to enabling supervisors to assess performance properly, the appraisal system is intended to improve relations within the Provisional Technical Secretariat (PTS). Paragraph 1.5 of the Directive requires a supervisor to provide staff members with regular and helpful feedback, including a mid-term review, during an appraisal period. The feedback is to be given in a professional and

constructive manner, and a supervisor is asked not to await an appraisal meeting to inform a staff member that his or her performance is not acceptable.

14. The JAP reiterated the statement made by the Tribunal in Judgment 2170, under 14, that an international organisation has a duty to comply with its internal rules and to conduct its affairs so as to allow its employees to be able to rely on the organisation's compliance.

15. The complainant alleged that Administrative Directive No. 2 (Rev.3) was violated because he did not receive appropriate feedback on his performance from his supervisor. The JAP found the assessment process was not violated on this account because the complainant had himself sufficiently confirmed that there was feedback on the completed appraisal forms. The JAP did not err with this finding.

16. However, the Tribunal considers that the Commission breached its own rules in relation to the complainant's performance appraisal process on two grounds. One was the late completion of the appraisals. The appraisal for the period 1 April 2007 to 31 March 2008 was done on 17 October 2008, i.e. about eight months after it was due. Both the mid-term and the final appraisals for 1 April 2008 to 31 March 2009 were done on the same date, 8 September 2009. A decision to offer a shorter extension of contract than is usual, when not based upon the needs of the Commission, would be informed by a person's performance. Paragraph 3.2 of Administrative Directive No. 20 (Rev.2) states that a proposal for possible reappointment or extension of an existing contract shall be accompanied by a justification as to the recommendation contained therein and a performance appraisal report.

17. The Tribunal notes that the mid-term and the final appraisals for 1 April 2008 to 31 March 2009 were completed on 8 September 2009.

This was prior to 16 September 2009, when the letter that offered the one-year extension was issued.

18. Secondly, the Commission breached its own rules regarding the procedure by which the performance appraisal report, which contained the recommendation for the extension of the contract, was to be communicated to the Personnel Division. Paragraph 3.2 of Administrative Directive No. 20 (Rev.2) requires the proposal for the extension of the contract to be submitted to the Personnel Division with a justification of the recommendation that was stated in the proposal. The performance appraisal report was also to be submitted with them.

19. There are good reasons for this provision. The proposal containing the recommendation, the justification of the recommendation and the performance appraisal report, submitted together, is intended to provide a complete picture of the performance of a staff member. This in turn is to inform a decision which that Division, the PAP or the Executive Secretary may have been required to make.

20. The decision is flawed for another reason as well. In addition to making a decision without a prerequisite of the PAP, it is evident from the letter of 4 November 2009 that the Executive Secretary could not have relied in his letter of 16 September 2009 on the recommendation of the PAP, which he endorsed on 30 September 2009.

21. In view of the procedural flaws and the violations of the Staff Regulations and Staff Rules and Administrative Directives, the decision of the Executive Secretary of 15 April 2011 as well as his earlier decision of 16 September 2009 are set aside.

22. However, considering the practical difficulties that would arise given the effluxion of time since the non-renewal of the

complainant's contract, the Tribunal will not order reinstatement. In the circumstances, it will award the complainant material damages in the amount equivalent to one year's salary, including benefits, entitlements and emoluments, with interest at 5 per cent per annum from 1 April 2010. It will also award him 30,000 euros in moral damages. Having succeeded, the complainant is entitled to costs in the amount of 8,000 euros.

DECISION

For the above reasons,

1. The decisions of the Executive Secretary of 15 April 2011 and of 16 September 2009 are set aside.
2. The Commission shall pay the complainant material damages in the amount equivalent to one year's salary, including benefits, entitlements and emoluments, with interest at 5 per cent per annum from 1 April 2010.
3. The Commission shall pay the complainant 30,000 euros in moral damages.
4. The Commission shall also pay him 8,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Hugh A. Rawlins
Catherine Comtet