

112th Session

Judgment No. 3087

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr O. N. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) on 19 November 2009 and corrected on 8 January 2010, the Commission's reply of 12 February, the complainant's rejoinder of 7 May and the Commission's surrejoinder of 2 July 2010;

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

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 Turkish national born in 1975, joined the Commission's Provisional Technical Secretariat (hereinafter "the Secretariat") on 5 February 2001 as an Associate Analyst, at grade P-2, in the Seismic, Hydroacoustic and Infrasound Monitoring Unit of the International Data Centre Division. His initial three-year fixed-term appointment was extended twice, for a period of two years each time, and was due to expire on 3 February 2008, by which time he would have accumulated a total of seven years' service in the Secretariat.

According to a policy introduced by the Commission in Administrative Directive No. 20 (Rev.2) of 8 July 1999, staff members appointed to the Professional and higher categories should not remain in service for more than seven years. Paragraph 4.2 of the Directive foresees exceptions to that seven-year limit based on “the need to retain essential expertise or memory”. Part of the system for implementing that policy is set out in a Note from the Executive Secretary of 19 September 2005. The second letter of extension of appointment, which the complainant accepted in October 2005, expressly provided that his appointment was subject to the provisions of that Note, *inter alia*.

According to the above-mentioned 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 incumbent’s division director submits a proposal on his or her possible reappointment. The members of the Panels then 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 of 19 September 2005 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 22 December 2006 a vacancy announcement was issued in respect of the complainant’s post. Under the heading “Qualifications” the announcement stated: “University degree in physics, geophysics, acoustics or a related field with experience in seismic, hydroacoustic and/or infrasound data analysis”. By a memorandum of 4 July 2007 the Executive Secretary set up two Personnel Advisory Panels with

identical membership to assess the outcome of the interviews as well as the possibility of granting an exceptional extension to the complainant. Following the interviews, by a memorandum of 16 July 2007 the complainant's division director recommended against a further extension on the ground, *inter alia*, that there was a qualified candidate among those who had applied and who had been interviewed.

On 1 August 2007 the Personnel Advisory Panels met and issued a report, unanimously supporting the recommendation of the division director not to grant an exceptional extension to the complainant. Among the three external candidates interviewed, the director had identified Mr P. as the only suitable candidate, and the Panels' members also unanimously supported that assessment. By a memorandum of 3 August the complainant was informed that the Executive Secretary had decided that his fixed-term appointment would not be extended beyond its expiry on 3 February 2008, because there was no basis upon which to grant him an exception to the maximum period of service. On 4 September 2007 the complainant requested a review of that decision and the decision to appoint Mr P. to the post. The Executive Secretary replied on 1 October that he was maintaining his decision regarding the non-extension of the complainant's contract and that the latter's request regarding the appointment of Mr P. was "unallowable". The complainant separated from service on 3 February 2008.

Prior to that, on 23 October 2007, he had filed an internal appeal with the Joint Appeals Panel regarding both the decision not to extend his appointment and the decision to appoint Mr P., arguing *inter alia* that the latter's educational qualifications did not satisfy the requirements set out in the vacancy announcement. In its report of 7 September 2009 the Panel shared that view and found that the error of fact thus committed by the Commission vitiated the entire process leading to the decision not to grant the complainant an exceptional extension. It explained that it "came to its conclusion with some difficulty", and had previously requested further clarification from the Administration, from several international organisations, as well as from the academic institution in question, in order to decide whether

the degree held by Mr P. was a “university degree”. The Panel recommended that the Executive Secretary set aside that decision and that he award material damages and costs upon presentation of bills. It also recommended that he identify a fair solution regarding the successful candidate, who had accepted the offer in good faith, but it rejected the complainant’s claim for moral damages.

By a letter of 6 October 2009 the Executive Secretary informed the complainant that, in his view, the conclusions and recommendations of the Joint Appeals Panel were based on an error of law and a mistake of fact. Consequently, he upheld his decision regarding the complainant’s appointment and dismissed his claims for damages and costs. He also reiterated that the complainant’s challenge to the appointment of Mr P. was “unallowable”. That is the impugned decision.

B. The complainant submits that the impugned decision is tainted with errors of fact and law. He questions whether the degree held by the successful candidate, an Associate’s degree in Scientific Analysis Technology from the Community College of the Air Force (CCAF), in the United States, obtained after only two years of study, constitutes a “university degree” within the meaning of the vacancy announcement pertaining to his post. He notes that in the internal appeal proceedings the Commission’s position was that Mr P.’s degree satisfied the requirements of the vacancy announcement and that it does not argue that the appointment was based on exceptional circumstances, as provided for under paragraph 1.7 of Administrative Directive No. 20 (Rev.2), which states that: “[...] candidates who do not possess [...] a [university] degree may be appointed if the combination of their education, training, self-study and working experience can be considered to be equivalent to the standard of knowledge normally associated with the attainment of a university degree in the respective field of work [...]”. The complainant points out that the Commission has not issued any administrative directive or other official document defining the term “university degree” and that, in its reply before the Joint Appeals Panel, it merely stated without elaboration that the “candidate selected does have a degree in the relevant field [...] which

was adjudged by the Administration as being of the same level as a ‘University Degree’”. Nor has the Commission offered any evidence as to its official understanding, policy or practice with respect to its recruitment standards as applied in this case or generally. The complainant therefore considers that the rules of the competition were not clearly or objectively set in advance. He invokes the definition of a “first university degree” provided by the International Civil Service Commission (ICSC) and followed by another leading Vienna-based international organisation as support for his argument that four years of study are required for a “university degree”.

Furthermore, the complainant submits that by denying him a fair and transparent procedure, the Commission breached its duty of good faith and thus injured his dignity. He also contends that there was undue delay in the internal appeal process which, in his view, amounts to a breach of due process. He emphasises in this regard that he pursued his appeal diligently.

He asks the Tribunal to set aside the impugned decision and to award him material damages equivalent to what he would have earned had his contract been extended for a period of three years, including all salaries, allowances, emoluments and entitlements, with interest. He also claims moral damages in the amount of 25,000 euros, as well as costs in the amount of 10,000 euros.

C. In its reply the Commission contends that the complaint is manifestly irreceivable on the grounds that the complainant has failed to provide a power of attorney from his representative, as required by Article 5, paragraph 2, of the Rules of the Tribunal. For the same reason, it argues that the Tribunal is not competent to entertain the complaint.

On the merits, it points out that, pursuant to Staff Regulation 4.4, the decision to extend or renew a fixed-term appointment lies within the discretion of the Executive Secretary. This provision implies that the complainant had no contractual right to be granted an extension beyond the expiry date of his appointment. Furthermore, Staff Rule 4.4.01(c) provides that, in granting fixed-term appointments, the

Executive Secretary shall bear in mind the non-career nature of the Commission. As a result, although paragraph 4.2 of Administrative Directive No. 20 (Rev.2) allows for contract extensions beyond seven years of service, a staff member who may possess a certain type of essential expertise or memory has no automatic right to an extension of his or her contract.

The Commission maintains that the candidate selected does have a degree in the relevant field, which the Executive Secretary, exercising his discretion as the competent authority, adjudged as being equivalent to a university degree. It stresses that this issue has already been addressed several times, in particular before the Joint Appeals Panel, and that the ICSC, when asked by the Panel whether, for a post requiring a “university degree”, a two-year degree from a tertiary-level college would suffice, replied that recruitment standards and their implementation fall under the purview of the executive heads of organisations, and not of the ICSC. It adds that the complainant’s claim in this regard is, in any event, untenable since he was not an applicant for the advertised post and therefore has no *locus standi* to contest the conditions in which the competition was held.

With regard to the allegation of breach of good faith, the Commission emphasises that the procedure followed was not only fair and transparent but also in conformity with the relevant provisions of the Staff Regulations and Staff Rules as well as those of Administrative Directive No. 20 (Rev.2) and the Executive Secretary’s Note of 19 September 2005. It submits that the complainant has produced no evidence showing that the impugned decision was motivated by malice, ill will, improper motive, fraud or similar dishonest purpose. Furthermore, it denies that there was any excessive delay in the internal appeal process.

D. In his rejoinder the complainant asserts that an original power of attorney in English was duly submitted to the Registry of the Tribunal and that the Commission’s objection to receivability should therefore be rejected. He reiterates his pleas and stresses that the Joint Appeals Panel recommended in its report that the Commission develop “clear, objective and transparent criteria for assessing the academic

qualifications of candidates”. He submits that the Commission’s view that the Executive Secretary has unfettered discretion to determine whether a candidate has the required “university degree”, in the absence of any standards, is unsound, and in this case resulted in an error of fact and law, as well as a breach of the duty to ensure fair and transparent recruitment procedures.

E. In its surrejoinder the Commission maintains its position in full.

CONSIDERATIONS

1. The complainant joined the Commission under a three-year fixed-term appointment on 5 February 2001. After two two-year extensions his appointment expired on 3 February 2008.

2. On 8 July 1999 Administrative Directive No. 20 (Rev.2) was issued. Paragraphs 4(1) and 4(2) of the Directive governing the length of appointment and tenure provide that:

“4.1 Appointments to the Professional and higher categories and all appointments of internationally recruited staff shall initially be made under a fixed-term contract for a period, normally of three years, which carries no expectation of renewal. These staff members may be granted two further appointments of two years each, subject to the provisions of this Directive. The need for rotation in staff will be an important consideration in determining whether to grant these appointments. Appointments of a shorter duration may also be granted when the needs of the Commission so require. The maximum period of service would be seven years.

4.2 Exceptions to the period of seven years referred to in paragraph 4.1 may be made because of the need to retain essential expertise or memory in the Secretariat and shall be kept to an absolute minimum compatible with the efficient operation of the Secretariat. Any such exceptions will be reported by the Executive Secretary to the Commission.”

On 19 September 2005 the Executive Secretary issued a Note setting out part of the system for implementing the seven-year service limitation policy. The provisions of the Administrative Directive, as well as those of the Note were then incorporated into the complainant’s

letter of appointment covering the period of 4 February 2006 to 3 February 2008.

3. The complainant received a memorandum dated 3 August 2007 from the Chief of the Personnel Section, notifying him of the Executive Secretary's decision not to extend his appointment beyond its expiry date of 3 February 2008. He requested a review of that decision, which was denied, and filed an appeal with the Joint Appeals Panel on 23 October 2007. In its report, dated 7 September 2009, the Panel found in the complainant's favour and recommended that the Executive Secretary:

- “(a) Set aside his decision not to grant the [complainant] an exceptional extension of his appointment beyond the seven-year limitation of service established by Administrative Directive No. 20 (Rev.2);
- (b) Award material damages in the amount of 12 months' salary and allowances based on the [complainant's] last salary, deducting any amounts he earned in the first 12 months following separation from service;
- (c) Reject the request for moral damages;
- (d) Award the costs of the internal appeal upon production of evidence of the actual costs incurred;
- (e) Identify a fair solution regarding the fixed-term appointment of the external candidate [Mr P.], who accepted the organisation's offer in good faith and has been performing in the post for over two years, which will cause him no injury; and
- (f) Develop clear, objective and transparent criteria for assessing the academic qualifications of candidates, if they do not yet exist in the Secretariat.”

4. In a letter dated 6 October 2009 the complainant was notified of the Executive Secretary's decision to allow his contract to expire as of 3 February 2008 and not to follow the recommendations of the Joint Appeals Panel concerning the setting aside of the

contested decision, the award of material damages and costs, and the identification of a fair solution for the external candidate who accepted the appointment in good faith. The complainant's claim for moral damages was also dismissed. In his decision the Executive Secretary stated that the Panel had "acted beyond the scope of authority granted to it by Staff Regulation 11.1 and Staff Rule 11.1.01 insofar as [the] recommendation [to develop clear, objective and transparent criteria for assessing the academic qualifications of candidates if they do not yet exist within the Secretariat] does not refer to the non-observance of the terms of appointment or of appeals against disciplinary decisions". Furthermore, he pointed out that the complainant's challenge to the appointment of Mr P. was "unallowable". His reasons for rejecting the Panel's recommendations were that "[its] conclusions and recommendations [...] were the outcome of both an error of law and a mistake on the fact of [its] part" as it erroneously concluded that the complainant had not challenged the appointment of the external candidate, Mr P. That conclusion, according to the Executive Secretary, "clearly runs contrary to the facts and to [the complainant's] statement of appeal submitted to the Joint Appeals Panel". The Panel had also concluded that "an error of fact had been made in appointing an external candidate who in its view did not hold the academic qualification required by the Vacancy Notice" and that the error of fact had vitiated the entire process, resulting in the refusal to extend the complainant's appointment. He noted that "the Panel's conclusion [was] the result of [its] own interpretation of the concept of 'university degree'" and that, while the Panel took note of the "response from the International Civil Service Commission (ICSC), the latter, on the contrary, reaffirms the fact that the determination and enforcement of recruitment standards falls within the purview of authority of the executive head of the organization". The Executive Secretary therefore observed that "it is not within the Panel's remit of authority to stipulate the requirements of the vacancy announcement, as it did do in its Report, as such an action impinges on the administrative attribution to establish and enforce recruitment standards" and that the Panel therefore

erroneously concluded that the decision to appoint the external candidate was tainted with an error of fact. That is the decision the complainant impugns before the Tribunal.

5. The complainant puts forward a number of pleas and claims which are set out under B, above. In particular, he claims moral damages on the grounds that the non-extension of his appointment was based on an error of fact and law, that his dignity was injured and that there was a delay in the internal appeal procedure which was excessive.

6. The Commission contests the receivability of the complaint on the grounds that it breaches paragraphs 1 and 2 of Article 5 of the Rules of the Tribunal. As a power of attorney was filed with the Tribunal's Registrar, who, in accordance with Article 6 of the Rules, then forwarded a copy of the complaint to the defendant Organization, there was no violation of Article 5.

7. The parties' briefs and the evidence they have produced are sufficient to enable the Tribunal to reach an informed decision. Accordingly, the complainant's application for oral hearings is rejected.

8. The primary question in this case is whether or not the successful external candidate fulfilled the academic requirement listed in the vacancy announcement, specifically, whether or not his associate degree is a university degree. The Tribunal is of the opinion that it is. The general term "university degree" refers to a degree given upon the completion of an accredited course of study at a university or an equivalent tertiary institution. There is considerable variation in terminology and definitions for the wide variety of degrees offered throughout the world. For this reason it is important that the academic requirements for a post be clearly defined; however, flexibility – through the use of general terms – may be required in order to reflect the different types of diploma awarded worldwide.

9. As the vacancy announcement, in this case, referred only to the requirement of a “university degree”, and considering that in other vacancy announcements terms such as “advanced university degree” and “first university degree” were used with respect to the minimum academic requirements set for the post in question, it should be considered that the successful external candidate’s associate degree fulfilled the academic requirements of the post. Furthermore, as the Commission correctly accepted that the external candidate’s associate degree met the academic requirements of the post, it was not required to substantiate the decision to appoint him. It would have had to do so only if it had relied on paragraph 1.7 of Administrative Directive No. 20 (Rev.2) to appoint him. Paragraph 1.7 relevantly provides that: “in exceptional cases, candidates who do not possess such a degree may be appointed if the combination of their education, training, self-study and working experience can be considered to be equivalent to the standard of knowledge normally associated with the attainment of a university degree in the respective field of work”.

10. Nothing turns on the fact that the degree in question is called an “associate degree” rather than a “bachelor degree”. The bachelor degree is usually a degree from a tertiary institution that grants first and higher degrees, so that a bachelor degree is sometimes referred to as a “first degree”. The complainant contends that, in the glossary to the Master Standard, the ICSC has defined a “first university degree” as: “an educational programme which results in the certification of qualifications obtained from a post-secondary institution such as university. Alternatively it can be the knowledge gained at a specialized technical or educational institute (e.g. College of Advanced Education, *Polytechnique*, *Fachhochschule*, Institute of Technology, etc.) which results in a bachelor’s degree or its equivalent. Examples of what would constitute first university degree level qualifications, would be [a] bachelor’s degree in science, arts or *licence en lettres*, *licence en sciences*, [etc]”. Moreover, the Panel noted but disregarded the response from UNESCO which referred them to a website concerning the recognition of academic and

professional qualifications and, in particular, the structure of education in the United States. According to the website, “[p]ostsecondary education includes non-degree programs that lead to certificates and diplomas plus six degree levels: associate, bachelor, first professional, master, advanced intermediate, and research doctorate”.

11. The Tribunal also notes that the Executive Secretary mentioned in several communications to the complainant, including the impugned decision, that his contestation of the appointment of the external candidate to his post was “unallowable”. To the contrary, the Tribunal considers that the complainant has a legitimate interest in contesting the external candidate’s appointment and making sure that the proper recruitment procedure is followed, given that the outcome of the recruitment process is twofold (as clarified in the Note of 19 September 2005): either the external candidate is appointed to the post or the complainant’s contract is extended; hence the decision to appoint Mr P. directly affects the complainant.

12. The allegation of breach of good faith and of a lack of transparency in the recruitment procedure is unfounded. The complainant has not shown that the Commission showed bad faith in deciding to recruit an external candidate instead of extending his contract beyond the maximum length of service. The Tribunal further notes that, as explained above, the term “university degree” encompasses the associate degree and, as such, the use of that term in the vacancy announcement was not inappropriate and did not show a lack of transparency.

13. The complainant asserts that the appeal procedure took almost two years and that this was too long. This claim is founded. The complainant and the Commission filed their respective statements of appeal (23 October 2007) and reply (21 December 2007) without delay, but after the complainant notified the Joint Appeals Panel that he would not submit a rejoinder (10 January 2008) it took another five months before the Panel was constituted. Furthermore, although the

Panel spent time awaiting responses from various sources concerning questions raised by the appeal (such as the definition of an associate degree or a university degree), it did not issue its final report until 7 September 2009. This represents an excessive delay warranting an award of moral damages in the amount of 1,000 euros. Having succeeded in part, the complainant is also entitled to costs, which the Tribunal fixes at 2,000 euros.

DECISION

For the above reasons,

1. The Commission shall pay the complainant moral damages in the amount of 1,000 euros.
2. It shall also pay him costs in the amount of 2,000 euros.
3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 10 November 2011, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

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