

## **NINETY-THIRD SESSION**

**Judgment No. 2144**

The Administrative Tribunal,

Considering the complaint filed by Mr A. S. against the Surveillance Authority of the European Free Trade Association (ESA) on 22 June 2001, the ESA's reply of 3 October, the complainant's rejoinder of 5 December 2001 and the Authority's surrejoinder of 11 February 2002;

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

Having examined the written submissions and disallowed the ESA's application for hearings;

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

A. The complainant, a Norwegian citizen born in 1958, first worked for the ESA from December 1995 to June 1996. At the beginning of 1997, he applied for a post as officer at grade P.3, responsible for the Health and Safety at work Sector, in the Persons, Services and Capital Movements Directorate ("PSC"). On 4 April 1997 he was appointed to the post for a period of three years, starting on 15 August 1997. During a six-month period he was also in charge of the Mutual Recognition of Diplomas Sector.

At a meeting held on 16 September 1999 between the complainant, one of the College Members<sup>(1)</sup> and the Director of PSC, the complainant was informed of the Authority's intention not to renew his contract upon its expiry, that is 14 August 2000. In a memorandum sent on 11 October 1999 to the above-mentioned College Member - a copy of which was sent to the Director of PSC and the President of the ESA - he explained that the workload envisaged in the sector warranted at least one officer being "allocated" to the Health and Safety at work Sector. He indicated that he was ready to assume these duties, but did not receive a written reply. The Authority maintains that an oral reply was given. By a letter of 20 October, the President informed the complainant that his contract would not be renewed. On 9 December 1999, the complainant wrote to the President requesting him to review this decision.

In a memorandum from the PSC Directorate dated 29 March 2000, it was indicated that "[the complainant]/New officer will have responsibility for Health and Safety at work and Mutual recognition." At a meeting in April 2000, a document entitled "Responsibility for sectors within PSC" was distributed, in which it was stated that a "New officer" would be responsible for "Mutual recognition", "Labour law" and "Health and safety".

A vacancy announcement was issued for two posts of officer at grade P.3 in PSC, for which the complainant applied on 31 May and was interviewed. Once again, the complainant says that he did not receive a written reply regarding his candidature and the Authority states that an oral reply was given.

On 6 May 2000 the complainant reminded the President that he had not received a written reply to his request of 9 December 1999. If his request was rejected, he asked for an internal appeal procedure to be opened. The Authority states that between December 1999 and May 2000 the complainant had frequent contacts with representatives of the Administration. By a letter of 8 June 2000, the President confirmed his decision. No agreement was reached on the matter during a consultation held on 5 July, in accordance with ESA Staff Regulation 45.

On 19 July the complainant was informed by electronic mail that a new officer would take over the Mutual

Recognition, Labour Law, and Health and Safety Sectors.

By a letter of 15 February 2001, he lodged an appeal with the President. The latter informed the complainant by a letter dated 18 April 2001, that he rejected his appeal, in accordance with the Advisory Board's unanimous opinion of 6 April. That is the impugned decision.

B. The complainant has three pleas.

First, the reason given for the non-renewal of his appointment was a lack of "flexibility". Yet he had been rated "very good" in his performance evaluation report dated 8 January 1999, both under the heading "Flexibility" and for his overall assessment. Moreover, he had indicated that he was ready to take on other duties. He notes that the Advisory Board refrained from taking a stand on the soundness of the reason invoked by the Authority. He concludes that the impugned decision is based on clearly false conclusions drawn from the facts and is not therefore based on a good reason.

Secondly, the decision is in breach of his legitimate expectation that his contract would be renewed. The vacancy announcement for his post had indicated that the appointment was "renewable" and, in practice, length of service in the ESA is normally six years.

Thirdly, the decision was taken in violation of the principle of good faith. The Authority did not give him the opportunity to prove his ability in fields other than health and safety at work, and then criticised his lack of "flexibility". It subsequently indicated that it wished to employ someone who could be responsible for a broader area, but planned to assign the new officer to sectors that are extremely close to those for which the complainant was responsible.

The complainant seeks the quashing of the impugned decision, the granting of a new three-year appointment with compensation for the material injury suffered or, if this is not possible, payment of 200,000 euros, moral damages, and costs.

C. In its reply, the Authority recalls that Regulation 13(1)(a) provides that:

"(iv) [a fixed-term] appointment may normally be renewed only once, for a period of up to three years, if this is in the interest of the Authority;

(v) there shall be no entitlement to a renewal of an appointment".

The Authority argues that a decision not to renew an appointment lies within the discretion of the President. It adds that the impugned decision is not tainted by any of the flaws for which it could be set aside, in accordance with the Tribunal's case law. It explains that the reason for the non-renewal was the need to recruit officials with a general legal background so that they could rapidly be entrusted with duties in new fields. Although the complainant had given complete satisfaction in his specific field, he did not fulfil these criteria. He was informed orally on several occasions before being notified in writing. The complainant's good performance evaluation was limited to his field of competence and did not mean that he had the necessary knowledge and experience to work in different sectors. Even so, he was allowed to participate in the competition, but the results of the selected candidates were much better than his. The Authority adds that, as the complainant had to a large extent reduced the backlog of work in the area of health and safety at work, it was "understandable that the Authority could not keep him on in that limited area while at the same time it was facing far more pressing backlog situations in other sectors".

With regard to the complainant's "legitimate expectation" that his appointment would be renewed, the ESA refers to Regulation 13(1)(a)(v). It asserts that the practice of retaining staff members in service for six years is in no way a mandatory rule. In the present case, it was in the interest of the Authority not to renew the complainant's appointment.

The Authority states that it acted objectively and within the framework of the Staff Regulations. Its good faith is amply demonstrated by the fact that it provided the complainant with two extremely favourable letters of recommendation and called him to several meetings with the representatives of the Administration. Moreover, he benefited from nearly 11 months notice and was able to participate in the competition.

The Authority submits that, as the complainant immediately found work once back in his country of origin, he

suffered no material injury, and the letters of recommendation prevented any harm to his reputation. It applies for oral hearings.

D. In his rejoinder, the complainant expresses surprise at the indication by the Authority that his appointment was not renewed because he had succeeded in reducing the backlog in his sector. He says that this amounts to a sanction for performing too well. With regard to the policy of recruiting staff with a general legal profile so that functions in new fields could rapidly be entrusted to them, he argues that his professional skills had been recognised on many occasions, including by the President of the Authority, that he had good knowledge of at least five sectors of PSC and that, contrary to the ESA's contention, his "flexibility" was a characteristic of his personality and not in any way limited to a specific field. It cannot therefore be seriously argued that he did not have the qualities required to continue working in the ESA. Moreover, he submits that his application was not treated fairly, because the vacancy announcement had been drawn up in such a way as to deny him any chance of being selected.

He presses his pleas concerning the breach of his legitimate expectation that his contract would be renewed and points out that the Authority does not deny the existence of the "six-year rule" of service. He also maintains his allegation of breach of good faith.

E. In its surrejoinder, the Authority reaffirms that the complainant's contract was not renewed because the work in the Health and Safety at work Sector had largely been cleared and the complainant did not have the necessary skills or "flexibility" to be able to work in other fields. It says that it is free to decide upon the professional profile of the staff that it wishes to recruit. It denies that the complainant had knowledge of more than two sectors within PSC and affirms that the competition procedure was entirely lawful.

The Authority fails to understand how the complainant could have a "legitimate expectation" of his contract being renewed when the work that remained to be done required skills he did not have. And even if the complainant nevertheless entertained such an expectation, there was no way in which it could prevail over a lawful decision not to renew his appointment.

## CONSIDERATIONS

1. The complainant challenges the decision taken by the President of the ESA on 18 April 2001 to dismiss his internal appeal, in which he sought the renewal of his appointment for three years. After working for the ESA from December 1995 to June 1996, he applied for a post of officer at grade P.3, responsible for the Health and Safety at work Sector in PSC. On 4 April 1997 he was appointed to the post with effect from 15 August 1997. His contract indicated that it could be renewed if it was in the interest of the ESA and that he would be informed at least six months before the expiry date of his appointment whether a renewal would be offered. The contract referred to Staff Regulation 13, which provides that a fixed-term appointment is generally granted for three years and "may normally be renewed only once, for a period of up to three years, if this is in the interest of the Authority".

2. The complainant was assigned to the Health and Safety at work Sector and, for a period of six months, the Mutual Recognition of Diplomas Sector. In December 1998, he received a favourable performance evaluation from his supervisor, whose overall assessment of his work was "very good". Despite this positive evaluation, he was informed orally in September 1999, during a meeting with a College Member and the Director of PSC, that it was not planned to propose the renewal of his appointment. Following this meeting, the complainant sent a memorandum to the College Member, with a copy to the President of the ESA and the Director of PSC, in which he emphasised that, taking into account the heavy workload in the Health and Safety at work Sector, at least one official should be "allocated" to the sector. He did not receive a written reply. On 20 October 1999 the President informed him that his appointment would not be renewed but, in February and August 2000, sent him two extremely favourable letters of recommendation. Following the publication of a vacancy announcement, in May 2000, the complainant applied for two posts of officer.

3. The President of the ESA confirmed the decision not to renew his appointment by a letter of 8 June 2000. No agreement was reached on the matter during a consultation held on 5 July between representatives of the Authority and of the Staff Association Committee, in accordance with Regulation 45(3) and (6). The President emphasised that the staff representatives were wrong to claim that there was a presumption that appointments would be renewed

where the staff had given satisfaction, as in the case of the complainant. He added that the reasons for the non-renewal were known to the complainant, but that he would confirm them in writing, which he did on 8 July 2000.

4. The complainant therefore left his post on the normal date on which his contract expired, namely 14 August 2000. After experiencing certain difficulties in obtaining the rules concerning the internal appeals procedure envisaged under Regulation 46, he filed an internal appeal with the President of the Authority on 15 February 2001. The Advisory Board issued a unanimous opinion on 6 April 2001 that the appeal should be dismissed. It considered that the complainant had been informed of the reasons for the challenged decision and that the Administration had remained within its discretion in deeming that it was in its interest to employ an officer with a broader professional profile than that of the complainant so that it could better set and change priorities in the different sectors. On 18 April 2001 the President of the ESA informed the complainant that he was maintaining his decision and dismissed the internal appeal. That is the impugned decision.

5. The complainant requests the Tribunal to set aside the decision of 18 April 2001 and to order the Authority to offer him a new three-year contract without a probationary period, as well as compensation for the material injury suffered or, if that is not possible, payment of 200,000 euros in compensation. He also seeks compensation for moral injury and costs. In support of his claims, he contends that the impugned decision is based on clearly wrong conclusions drawn from the facts and is not therefore based on a good reason. He says that the decision was taken in breach of his legitimate expectation that his contract would be renewed and in violation of the principle of good faith.

6. Decisions not to renew fixed-term contracts lie within the discretion of international organisations and the parties agree that, in exercising its limited review, the Tribunal must ascertain whether such decisions are based on good reasons and whether they were notified to the employee (see in particular Judgments 675 and 1154). In this respect, the complainant contends that the reasons given by the Authority are both inexact and inadequate to justify the decision taken by the President of the ESA. He adds that the Advisory Board took no stand on the validity of the reasons given. Lastly, he recalls that he is a very good professional, which is not denied by the Authority.

7. The written submissions, and particularly the letter of the President of the Authority dated 8 July 2000, show that in a small organisation such as the ESA it is essential for employees to have basic general knowledge, and particularly on legal matters, enabling them to cover very broad fields and, in line with priorities which may change, to show great "flexibility". It is because, in the Authority's view, the complainant lacked such flexibility outside his own field, namely health and safety at work, which he mastered well, that the responsible authority considered it necessary to recruit employees with a legal profile and a certain versatility. The complainant challenges this interpretation and recalls that he also worked in the Mutual Recognition of Diplomas Sector. However, it must be recalled that he was responsible for the latter for only six months and that, although he performed well in the Health and Safety at work Sector, needs in other sectors made it necessary to redefine the post and seek more polyvalent employees with competence in legal matters.

The reasons given by the Authority to justify its decision not to renew the complainant's contract are, therefore, related to a concern for sound management. They are not tainted by any material error and could therefore be taken into account by the President in the exercise of his discretion. It may be added that, although the complainant considers he could have discharged one of the posts put up for competition in May 2000, he has not formally challenged the results of the competition.

8. The complainant's plea concerning his legitimate expectation that his contract would be renewed must also fail. Although Regulation 13 provides that fixed-term appointments may "normally" be renewed only once, this is subject to such renewal being in the interest of the Authority. Staff members do not have a right to the renewal of their appointments, even though the President was wrong to state in his letter of 8 June 2000 that the Authority had "full freedom" to take decisions in this respect. Moreover, while the complainant could expect that his appointment would not be limited to three years - in view of the indication in the vacancy announcement for which he applied in 1997 that the three-year contract was "renewable" - it was clear from the terms of the contract that renewal would only be offered if it was in the interest of the Authority.

9. The plea that the Authority was in violation of the principle of good faith must also fail. In fact, the Authority warned the complainant in good time. It was not obliged to offer him the opportunity to prove himself in sectors other than those assigned to him and it provided him with extremely favourable letters of recommendation. There is nothing to indicate that it acted in bad faith in this case, in which its decision was unanimously upheld by the

Advisory Board.

10. The pleas having failed, the claims for compensation and for the decision to be set aside must be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

*(Signed)*

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet

1. The Authority is led by a College, which is made up of three Members appointed by the Governments of the European Free Trade Association Member States.