The Administrative Tribunal,

Considering the complaint filed by Mrs F.S. W. against the International Criminal Court (ICC) on 28 November 2005, the ICC's reply of 30 January 2006, the complainant's rejoinder of 3 April and the Court's surrejoinder of 3 July 2006;

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, a British national, was born in 1952. She joined the staff of the ICC on 25 October 2004 as a Legal Secretary, at grade G.5, under a fixed-term contract for a period of one year. She worked for two judges, both of whom were her direct supervisors.

On 13 June 2005, following an incident that had arisen in early June, the First Vice-President of the Court met with the complainant to discuss concerns raised by her supervisors about her performance. The supervisors sent a joint memorandum dated 7 July 2005 to the First Vice-President, expressing negative comments on the complainant's performance. They indicated that if her performance did not improve it might not be possible for them to continue their professional relationship with her. The memorandum was copied to the complainant, who took up the matter with the Focal Point for Judges and with the Administrative Officer at the Presidency of the ICC.

The Chief of the Human Resources Section met with the complainant on 10 August and later the same day sent her an e-mail confirming what they had discussed. In that e-mail he said that her contract "may not be extended" when it expired on 24 October 2005. He mentioned that the complainant had said she would be discussing the memorandum of 7 July with her two supervisors and would ask them to give her "another chance".

The complainant met with one supervisor on 10 August and the other on 25 August. Then accompanied on each occasion by two staff representatives, she had meetings with the Chief of the Human Resources Section on 29 and 31 August to discuss the outcome of the conversations she had had with her supervisors.

In an e-mail of 1 September 2005 to the complainant, which she cites as the impugned decision, the Chief of the Human Resources Section confirmed what was said in the meeting of 31 August. He noted that her supervisors had spoken with her about her performance – more particularly about two concrete incidents – and had given her the chance to improve, but considered that she had not shown "sufficient improvement". He had also mentioned that it would not be possible for her to "continue [her] cooperation" with her two supervisors after 24 October 2005, and that she had to "be prepared" that her contract would not be extended.

The complainant was subsequently offered a general temporary assistance (GTA) contract, for a period of a little over two months, i.e. until 31 December 2005. She chose not to accept it and sent an e-mail to the Registrar on 23 September, in which, citing Staff Rule 109.3, she notified her wish to resign "on short notice", with immediate effect. Responding the same day, the Registrar accepted her resignation.

B. The complainant submits that the "decision" not to renew her contract was tainted by procedural flaws. Firstly, there was no proper appraisal of her performance before the non-renewal decision was taken. Noting that the Staff Regulations and Staff Rules had been in force since September 2003 and April 2005 respectively, and that a competency-based performance appraisal system had been put in place, she argues that the Court should have assessed her performance by way of periodic performance appraisals. According to guidelines on the appraisal system, which were issued in April 2005, not only were her supervisors obliged to assess her performance but they were obliged to discuss the appraisal with her and allow her the opportunity to respond. She points out that prior to receiving the memorandum of 7 July – which was not even addressed to her directly – she was not aware that her

performance was lacking. She was placed in the position of having to approach her supervisors to ask for “another chance”, despite not having been given a formal appraisal or a proper opportunity to comment. Moreover, the said memorandum was written in very general terms and did not set out any specific concerns related to her work. In her view, the action taken by the ICC on the basis of that memorandum reflects a lack of due process, as well as a lack of fairness and good faith on its part.

Secondly, she argues that she had the right to be given fair warning about her performance and an adequate opportunity to rectify any perceived professional shortcomings. In this regard, she points out that, owing to sick leave and annual leave, between 7 July when her supervisors first raised issues about her performance and 31 August when she was informed orally that her contract would not be renewed, she was present at work for only 23 days. She adds that no specific objectives had been set for her with regard to her post and she had no way of knowing how her performance would be assessed.

Thirdly, the complainant submits that she had a right to have recourse to an internal appeal procedure. That right was denied, since the internal bodies provided for in the Staff Regulations and Staff Rules had not yet been put in place;in the absence of such internal mechanisms she is appealing directly to the Tribunal.

On the merits, she argues that there was no sound basis for the decision not to renew her contract. In her opinion, whatever her supervisors may have held against her concerning individual “incidents”, those matters did not constitute valid grounds for non-renewal.The errors she is alleged to have made were beyond her remit or control and amounted to misunderstandings between her and her supervisors.There was no pattern of events reflecting substantive performance issues, and she considers that she had a legitimate expectation that her contract would be renewed for up to three years. She considers that the placing on her official status file of unsubstantiated allegations of underperformance was damaging to her reputation.

The complainant, who is not seeking reinstatement, claims material damages, in an amount equal to three years’ net salary, and 30,000 euros in moral damages. She asks that the memorandum of 7 July 2005 be removed from her official status file. She also claims costs.

C. In its reply the ICC contends that the complaint is irreceivable *ratione materiae*. For one thing, the complainant is not challenging a final decision within the meaning of Article VII(1) of the Tribunal’s Statute.The e-mail of 1 September 2005 that she cites as the impugned decision was no more than a brief summary of the meeting that had taken place the previous day; it did not *de facto* or *de jure* communicate to the complainant an administrative decision concerning her contractual status. Nor did that e-mail constitute a decision that produced any legal effect.It would only have produced a legal effect if she had been separated from service on 24 October 2005, but her separation was brought forward by her own action. The ICC says that at all material times it was making efforts to reassign her to another position, but those efforts were brought to an end when, of her own free will, she resigned at short notice on 23 September.

Replying to the complainant’s allegations of procedural flaws, the ICC states, firstly, that for all practical purposes the memorandum of 7 July contained an evaluation of the complainant’s professional performance.However, the complainant chose not to comment on that appraisal, despite being urged to do so by the Chief of the Human Resources Section. Secondly, it argues that she was given due warning because on numerous occasions her two supervisors drew her attention to her professional shortcomings. Thirdly, regarding the internal appeal mechanisms, the ICC points out that it made every effort to put in place the administrative bodies foreseen under the Staff Rules adopted on 21 April 2005 and staff were informed of the composition of the Appeals Board on 18 January 2006.

The ICC considers that the complaint is devoid of merit as the cessation of the complainant’s functions was brought about by her voluntary resignation and not by any administrative decision taken by the Court. Moreover, it contends that non-renewal is a discretionary matter, and that there was no basis for her expectation of renewal for a further three years. Indeed, it was specified on her initial contract that her appointment did not “carry any expectancy of renewal or of conversion to any other type of appointment”. As the complainant has since taken up employment elsewhere, it considers that she has suffered no material injury, and asks the Tribunal to reject her claim for damages.

D. In her rejoinder the complainant, with regard to the receivability of her complaint, submits that it is clear that by 1 September 2005 the decision not to renew her appointment had been taken, and that the e-mail she received on that date was the final written confirmation of that fact.Moreover, the decision she is challenging did have a

legal effect, as it put an end to her contractual status as a Legal Secretary.It was made clear to her that her one-year contract would not be renewed, and that led her to tender her resignation.

She maintains that her supervisors never approached her about her performance as a whole, and the conversations she had with them related to day-to-day matters and specific incidents such as typically arise in a working environment. She concedes that upon receiving the copy of the memorandum of 7 July 2005 from her supervisors she did not reply in writing, but she points out that she was never given to believe that that memorandum was part of her performance appraisal.

E. In its surrejoinder the ICC maintains its objection to receivability. It reiterates its argument that, at all material times, the complainant was fully aware of the reservations her supervisors had about her work, but failed to respond to their concerns.

CONSIDERATIONS

1. The complainant was employed by the ICC under a one-year fixed-term contract commencing on 25 October 2004. She was appointed to work as a Legal Secretary to two judges both of whom expressed concern as to her performance in a memorandum sent to the First Vice-President of the Court on 7 July 2005. On the same day, the complainant was provided with a copy of that memorandum and she met with the First Vice-President with whom she had previously spoken in relation to some earlier events. The following day, she had discussions with the Focal Point for Judges and, also, with the Administrative Officer at the Presidency of the ICC concerning the memorandum.

2. On 10 August the complainant had a meeting with the Chief of the Human Resources Section who discussed her performance with her and, also, the question of the extension of her contract. He sent her an e-mail the same day referring to their meeting and stating that:

“On the basis of the assessment of your performance […] [as] expressed in [the] memorandum dated 7 July 2005 your contract may not be extended. You have told me that you intend to talk to both judges [...] and ask them to give you another chance.”

The complainant later spoke to the two judges concerned, but they maintained the substance of their memorandum of 7 July.

3. The complainant met again with the Chief of the Human Resources Section on 31 August. That meeting was followed, on 1 September, by an e-mail in which it was said:

“I have informed you that it is not possible to continue your cooperation with [the two judges] beyond the expiry date of your current contract (24 October 2005) and that you have to be prepared that your contract will not be extended.”

It was also said in that e-mail that:

“this has no negative effect on your chances of being considered for other positions with the Court bearing in mind that in all cases of filling established posts we have to follow the requested procedures.”

On 31 August the Chief of the Human Resources Section had sent an e-mail to the Administrative Officer at the Presidency stating that he had had a long conversation with the complainant and adding:

“Since there was some procedural vagueness in the whole process which is not [the complainant’s] responsibility I would like to make another effort in finding possible alternatives for giving [her] a second chance.”

4. On 13 September the complainant met with the Administrative Officer at the Presidency who offered her “an appointment charged to [general temporary assistance] GTA funds for the period [from] 24 October [...] till 31 December” working with the Senior Legal Adviser of the Pre-Trial Division who was to join the division later that month. The Administrative Officer explained to the complainant that it was a “humanitarian” proposal “to allow her more time to look for jobs at the court or elsewhere”. On 23 September 2005 the complainant declined this offer and asked that her resignation be accepted “on short notice”, with immediate effect. Her resignation was duly

accepted.

5. In tendering her resignation, the complainant stated that she had been "officially informed" by the Chief of the Human Resources Section on 31 August that her contract would not be renewed and that this had been confirmed by e-mail the next day. She noted that the offer of a two-month interim position was to a post that did not then exist and had been presented to her "as only a two-month option". She also stated that fair procedures had not been followed to alert her to any performance shortcomings, a claim which is, to some extent, corroborated by the statement made by the Chief of the Human Resources Section to the effect that there had been "some procedural vagueness in the whole process".

6. The complainant filed a complaint with the Tribunal on 28 November 2005 challenging the decision not to renew her contract, which decision, she claims, was notified to her in the e-mail of 1 September 2005. She seeks material damages in an amount equivalent to three years' net salary, moral damages in the sum of 30,000 euros and removal of the judges' memorandum of 7 July 2005 from her official status file.

7. No challenge is made to the receivability of the complaint on the ground that internal appeal procedures were not exhausted. Doubtless, this is because the composition of the Appeals Board occurred only in January 2006. However, the ICC maintains that the complaint is irreceivable by reason that no final decision had been communicated to the complainant before she submitted her resignation. Further, it is contended that, if there was a decision, her resignation deprived it of legal effect.

8. It is correct, as the ICC contends, that the complainant was not provided with a formal notification from the Registrar of the Court of the non-renewal or non-extension of her contract. However, the e-mail of 1 September 2005 from the Chief of the Human Resources Section clearly informed her that she could not continue as the Secretary to the two judges with whom she had been working and that she had "to be prepared that [her] contract will not be extended". In this respect, there was a marked difference in language from the earlier e-mail of 10 August 2005 in which she was advised that her contract "may not be extended". In view of the status of the person who sent the e-mails and the changed language, it is to be inferred that in the e-mail of 1 September 2005 it was intended to communicate a decision that the complainant's contract would not be renewed or extended in the normal course and, indeed, would not be renewed or extended at all unless she was appointed to some other post "follow[ing] the requested procedures". See Judgment 2112 where it was said that notification of a decision can be effected "in the manner prescribed by the organisation [or] may [...] take some other form as long as it can be inferred from it that the organisation intended to notify the decision".

9. It is also correct that some efforts were made, after 1 September 2005, to find another position for the complainant. These efforts did not involve the complainant until 13 September when it was made clear to her that the only possibility was a two-month appointment to an unbudgeted post. The question arises whether these efforts meant that the decision communicated on 1 September is properly to be considered as not constituting a final decision for the purposes of Article VII(1) of the Tribunal's Statute. They did not have that effect. Indeed, the offer from the Administrative Officer on 13 September and the terms in which it was conveyed had the effect of confirming the substance of the decision of 1 September, namely, that the complainant's contract would not be renewed or extended in the ordinary course.

10. The ICC's argument that the complainant's resignation deprived the decision of 1 September 2005 of legal effect must be rejected. It is correct, as the ICC contends, that the word "decision" has been treated by the Tribunal "as denoting any action by an officer of the organisation which has a legal effect" (see Judgment 532, under 3). However, some clarification is needed in cases involving the non-renewal or non-extension of a contract. In such cases, the legal effect derives directly and immediately from the contract itself but, sometimes, indirectly from an organisation's regulations. Thus, it was said in Judgment 1317, under 23, that:

"even where an organisation's staff regulations say that a fixed-term contract is *ipso facto* extinguished on expiry non-renewal is to be treated as a distinct and challengeable administrative decision." (emphasis added)

Notification of non-renewal or non-extension of a contract is simply notification that the contract will expire according to its terms. However, the Tribunal's case law has it that that notification is to be treated as a decision having legal effect for the purposes of Article VII(1) of its Statute.

11. By accepting the complainant's resignation, the ICC agreed to vary the terms of her contract so that it came

to an end on 23 September 2005 and not on 24 October 2005. Her resignation did not otherwise alter the legal effect which the Tribunal's case law ascribes to the non-renewal or non-extension of a contract. Accordingly, the complaint is receivable.

12. It is well settled that "[a]n organisation may not in good faith end someone's appointment for poor performance without first warning him and giving him an opportunity to do better". (See Judgment 1583, under 6.) Moreover, as was pointed out in Judgment 2414, an organisation "cannot base an adverse decision on a staff member's unsatisfactory performance if it has not complied with the rules established to evaluate that performance".

13. It is not disputed that the ICC Staff Regulations and Staff Rules lay down procedures for performance appraisal of staff members. Nor is it disputed that those procedures were not followed in the present case. That may be because those procedures were not implemented until some time after April 2005. Whatever the reason, the very least that was required of the ICC was that there be adequate procedures to enable a staff member to be informed of poor performance, to provide appropriate explanations and to be given an opportunity to improve his or her performance.

14. The only written record of any difficulty with the complainant's performance is the judges' memorandum of 7 July 2005. That document acknowledges that she was "a competent and experienced secretary" but stated that she was "not always fully reliable". It was said that she did not always "carry out her assignments accurately or in a timely manner", that her "planning and organisational performance [was] not fully satisfactory" and that she had "forgotten to convey important telephone messages [...], confused the scheduling of appointments and [failed to] carry out some of her assigned tasks without good reason". Although a copy of that memorandum was provided to the complainant, no specific details were provided as to her shortcomings and she was, thus, not in a position to offer any explanation of her actions or inactions. Of the two "concrete incidents" referred to in the e-mail of 1 September 2005, the complainant has provided credible explanations in her complaint, including in one case, with supporting documentation. However, the ICC maintains, in the face of that documentation, that she failed to provide an explanation to the supervisor in question.

15. Given the memorandum of 7 July and the various meetings which, on her own account, the complainant had with the First Vice-President, the Focal Point and the Administrative Officer at the Presidency, it is properly to be concluded that there were some difficulties with her performance – a conclusion which is, to some extent, supported by her request for "another chance". However, it is clear that these difficulties were not properly recorded and that the complainant was not provided with a reasonable opportunity to improve her performance. In this regard, the complainant points out that she was only at work for 23 days between 7 July and 31 August when she was orally informed that she must prepare herself for non-renewal of her contract. More significantly, it appears that she was only at work for ten days between 7 July and 9 August when the two judges for whom she worked informed the Administrative Officer at the Presidency that they did not intend to extend her contract. This was clearly insufficient opportunity for the complainant to improve her performance.

16. It follows that the decision neither to renew nor extend the complainant's contract cannot be sustained on the basis of her work performance, that being the only reason ever assigned for the decision. Accordingly, the decision of 1 September 2005 must be set aside. However, it does not follow that the complainant is entitled to the material damages claimed. There is no basis for supposing that her contract would have been renewed for a period of three years. In view of the Tribunal's finding that there were some difficulties with her performance, it is proper to conclude that, had correct procedures been followed, her contract would have been extended for a period of six months to afford her a chance to improve. As reinstatement is not sought, she should be awarded material damages equivalent to six months' net base salary less the amount of her earnings in the six months immediately following her resignation. Additionally, the ICC should pay the complainant moral damages in the sum of 2,000 euros and costs in the sum of 500 euros. As there is no evidence that the judges' memorandum of 7 July 2005 was placed in the complainant's official status file, there will be no order for its removal.

DECISION

For the above reasons,

1. The decision of 1 September 2005 is set aside.

2. The ICC shall pay the complainant material damages equivalent to six months' net base salary less the amount earned by her in the six months following her resignation.

3. It shall also pay her moral damages in the sum of 2,000 euros and costs in the sum of 500 euros.

4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 3 November 2006, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.