

**106th Session**

**Judgment No. 2799**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr L.-E.G. D. G. against the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom hereinafter “the Commission”) on 12 October 2007, the Commission’s reply of 17 January 2008, the complainant’s rejoinder of 26 March and the Commission’s surrejoinder of 2 May 2008;

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. 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 and all internationally recruited staff should not remain in service for more than seven years. Paragraph 4.2 of the Directive provides in part that exceptions to the period of seven years may be made because of the need to retain essential expertise or memory in the Secretariat. In Judgment 2315, delivered on 4 February 2004, the Tribunal held that

the seven-year policy embodied in the Directive was not applicable to a staff member until it had been incorporated into his or her contract of employment as a term or condition.

The complainant, a Swedish national born in 1945, joined the Provisional Technical Secretariat of the Commission whose headquarters are in Vienna on 30 November 1997 under a three-year fixed-term appointment as Chief of the Scientific Methods and Data Fusion Section, International Data Centre Division, in the Provisional Technical Secretariat, at level P-5. He was subsequently offered two successive two-year extensions of his fixed-term appointment, which he accepted, bringing his period of service with the Commission to a total of seven years. Under the second extension, which expired on 29 November 2004, his function changed and he became Head of the Radionuclide Development Unit.

By a letter of extension of appointment dated 31 March 2004 the complainant was offered a further two-year extension of his fixed-term appointment, with effect from 30 November 2004, which he accepted. Like the other two previous letters of extension the letter provided *inter alia* that this “extension shall not be deemed to carry any expectation of or right to another extension, renewal or any other appointment”. It also stipulated that the extension was “subject to the provisions of the Staff Regulations, Staff Rules and Administrative Directives of the Commission, together with such amendments as may from time to time be made thereto”.

The Executive Secretary issued a Note on 19 September 2005 which explained, in part, the system for implementing the seven-year service limit provisions of Administrative Directive No. 20 (Rev.2). Under that 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 relevant division director may request that the post be advertised in parallel to considering the incumbent for an exceptional extension. The incumbent is considered for an extension as a matter of course. A Personnel Advisory Panel interviews the shortlisted candidates and the division director submits a proposal regarding the possible “reappointment” of the incumbent. The Panel considers

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. It then makes a recommendation to the Executive Secretary.

On 13 October 2005 the complainant signed a rider to his letter of 31 March 2004, whereby the Executive Secretary's Note of 19 September 2005 was incorporated into his contract.

Following a restructuring within the Commission, with effect from 13 February 2006 the complainant was assigned, contrary to the wishes he had expressed in an e-mail of 12 January to his division director, to the position of Acting Head of the Waveform Development Unit in the Waveform Development and Software Integration Section. This unit later became the Scientific Methods Unit.

On 19 May 2006 the complainant sent an e-mail to his division director enquiring inter alia about his performance appraisal report, which was now overdue. His division director replied the same day, stating that he probably did not need an appraisal. The complainant subsequently received his appraisal on 23 May.

A Personnel Advisory Panel was set up on 23 May 2006 to provide the Executive Secretary with a recommendation regarding the possible extension of the complainant's appointment upon its expiry on 29 November 2006. By a memorandum of 25 May the complainant's division director recommended against a further extension on the grounds that there was no justification for an exception based on the need to retain essential expertise or memory. He explained that notwithstanding the rider to his contract the complainant's post was being discontinued as a result of the restructuring.

In its report of 26 May 2006 the Personnel Advisory Panel did not recommend the complainant for "re-appointment". The complainant was informed by a memorandum of the same date that the Executive Secretary had decided that there was no basis upon which to grant an exception to the maximum period of service. By a letter of 27 July the complainant requested a review of that decision. The Executive

Secretary replied on 28 August that he was maintaining his decision. He emphasised that the complainant's post would not be continued in its current form and grade and that the complainant had indicated that he did not want to be considered for a post of a lower grade or for the position of Head of the Scientific Methods Unit.

Meanwhile, on 30 June 2006 the Commission advertised the posts of Senior Radionuclide Officer and Senior Scientific Methods Unit Head, both of which were at level P-5.

On 28 September 2006 the complainant filed an internal appeal with the Joint Appeals Panel regarding the decision not to award him an exceptional extension. While the appeal process was ongoing he received a memorandum dated 14 November 2006 in which his division director informed him that because his position as Head of the Radionuclide Development Unit was discontinued in the current structure of the International Data Centre Division, he was being assimilated as the incumbent of the position of Senior Radionuclide Officer at level P-5. The division director asked him to communicate his interest, if any, in that position. The complainant replied on 17 November indicating that he was unable to respond because he had not received a letter from the Executive Secretary withdrawing the decision, communicated to him by a memorandum of 26 May, not to extend his contract. He further explained that he had entered into a new contract with his former employer in Sweden and was expected to begin work in two weeks.

By a memorandum dated 28 November 2006 the Chief of the Personnel Section informed the complainant that the Executive Secretary had decided to grant him an exceptional extension of his appointment until 29 July 2008. On the same date the Commission submitted its reply to the Joint Appeals Panel, arguing that the complainant's internal appeal was moot since he had been offered an extension.

The complainant subsequently informed the Administration that the memorandum of 28 November had reached him after he had relocated to Sweden and reported to his new employer. At this late date he was unable to obtain an extension of the leave of absence this

employer had originally granted him in order to work at the Commission. For that and other personal reasons, he felt forced “[w]ith very sad feelings” not to accept the Commission’s offer.

In its report dated 15 June 2007 the Joint Appeals Panel recommended that the complainant be awarded the equivalent of 20 months’ salary and benefits, “net of any earnings”, and moral damages in the amount of 20,000 United States dollars. On 13 July 2007 the Executive Secretary informed the complainant that he had decided not to follow the Panel’s recommendations. That is the impugned decision.

B. The complainant argues that the decision-making process regarding a possible exceptional extension of his appointment was fraudulent and that the initial decision not to grant him an extension involved an error of law. The Commission did not follow the system outlined in the Executive Secretary’s Note of 19 September 2005, which was incorporated into his contract by a rider. He contends that in December 2005 his division director told him that he would have to accept a downgrade in the level of his position from P-5 to P-4 if he wanted to be considered for an extension. In his view this was illegal and a humiliating act of harassment, as was the decision to move him to the position of Acting Head of the Waveform Development Unit. He explains that on 13 February, when his division director asked him if he wished to be considered for an exceptional extension in that position, he refused on the basis that he wanted to protect his right to be considered as the incumbent of his contractual position.

He further alleges that the process was carried out in an expeditious, careless manner and that it had a predetermined outcome. His Performance Appraisal Report was completed almost six months late but only three days before the meeting of the Personnel Advisory Panel. He received the initial decision not to extend his contract within four days of the date the Panel was set up. He points to the fact that a “Note for the Files” by the Executive Secretary documenting his decision was dated 24 May, two days in advance of the decision. In addition, the selection of two Panel members who were known to be hostile toward him was “provocative”. In his view, his division

director's behaviour and the process by which the Panel was set up and given only three days to consider his case was a breach of the principle of mutual trust.

The complainant submits that, based on his expertise and experience, he had a realistic expectation to be granted another extension of his contract. The fact that the Commission's vacancy announcement for the position of Senior Radionuclide Officer at level P-5 was essentially a "photocopy" of the position he had held since 2002, except that it excluded the Unit Head responsibilities, shows that the Executive Secretary's conclusion that he did not possess essential expertise or memory was false. Indeed, he was offered an extension of his appointment on the same day that he was leaving Vienna and this, in his opinion, is further evidence that the Executive Secretary's decision was arbitrary.

The complainant also contends that he was subjected to mobbing and harassment by his division director. He asserts that the entire process surrounding the consideration of the extension of his appointment was humiliating and that it tainted his good name.

The complainant asks the Tribunal to set aside the impugned decision and to order the Commission to pay him material damages in an amount equivalent to what he would have earned had his contract been extended for a period of three years, including "all salaries with step increases, benefits and emoluments (net of any other earnings during this period)", plus interest at the rate of 8 per cent from the date those damages are due. He also claims 80,000 euros in moral damages for injury to his dignity and good name, and 1,000 euros in costs.

C. In its reply the Commission submits that, pursuant to Staff Regulation 4.4, the Executive Secretary has the discretion to extend or renew a fixed-term appointment. This provision denied the complainant any contractual right to be granted an extension beyond the expiry date of his appointment, *a fortiori* an exceptional extension. 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. Consequently, although

paragraph 4.2 of Administrative Directive No. 20 (Rev.2) allows for contract extensions beyond seven years, the fact that a staff member may possess a type of essential expertise or memory is not determinative.

The Commission argues that when a staff member's post is either abolished or its functions and responsibilities are distributed among other posts, the procedures provided for in the Executive Secretary's Note of 19 September 2005 would *de facto* and *de jure* not be applicable, notwithstanding the fact that the incumbent has signed a rider such as the one signed by the complainant. This is because the system for implementing the service-limitation provisions is based on a request from the relevant division director to advertise the post held by the incumbent. When the post is discontinued there is no such request.

The defendant denies that the Executive Secretary made his decision before the Personnel Advisory Panel had considered the complainant's case and made a recommendation. The "Note for the Files" was dated 24 May as the result of a typographical error.

It maintains that the Panel was properly set up and constituted in conformity with the relevant provisions of Administrative Directive No. 20 (Rev.2). It had sufficient time to consider the complainant's case and could have taken longer if necessary, since no deadline was imposed on it. Furthermore, the complainant's comments regarding the Panel members are not enough to raise a suspicion or to constitute proof of prejudice as it is defined by the Tribunal's case law.

The Commission also denies that it threatened to downgrade the complainant's post. It argues that his claims relating to downgrading, mobbing, harassment and the illegality of his reassignment are all irreceivable for failure to exhaust internal appeal remedies.

It points out that the Executive Secretary reassessed the complainant's case following developments in the Democratic People's Republic of Korea relating to nuclear testing and offered him an exceptional extension of his appointment. As the complainant declined this offer, his complaint is moot and the defendant is, in its view, absolved of any legal liability regarding his separation from service.

D. In his rejoinder the complainant elaborates on his pleas. He stresses that his expectations regarding an exceptional extension were first raised after the Executive Secretary issued his memorandum and Note of 19 September 2005. He further argues that a comparison between his post and the vacancy announcement for the Senior Radionuclide Officer demonstrates that his post was not *de facto* abolished.

E. In its surrejoinder the defendant submits that while the complainant's hopes for an exceptional extension may well have been raised, he should have borne in mind that such extensions are not automatic. It also denies that the respective qualifications and competencies of the complainant's post and that of the advertised post of Senior Radionuclide Officer are the same. In any event, the complainant declined the Executive Secretary's offer of that post.

### CONSIDERATIONS

1. The complainant is a former official of the Commission. His employment came to an end on 29 November 2006 with the expiry of the last extension of his contract. The decision not to extend his appointment further was the subject of an internal appeal. In its report of 15 June 2007 the Joint Appeals Panel found that it was no longer realistic to extend the complainant's contract and recommended that he be paid the equivalent of 20 months' salary, including all benefits, net of any earnings, and moral damages in the amount of 20,000 United States dollars. The Executive Secretary rejected that recommendation by a decision dated 13 July 2007. The complainant challenges that decision asking the Tribunal to set it aside. He seeks material damages in an amount equivalent to what he would have earned had his contract been extended for a period of three years, including "all salaries with step increases, benefits and emoluments (net of any other earnings during this period)", and moral damages in the sum of 80,000 euros, as originally claimed in his internal appeal, together with interest and costs.



2. The complainant commenced employment with the Commission in November 1997 and his contract was extended from time to time, the last extension being granted on 31 March 2004 for a period of two years commencing from 30 November of that year. The letter of extension identified the complainant as “Head, Radionuclide Development Unit”. A job description of January 2004 specified that the post was graded P-5 and there was nothing to the contrary in the letter of extension. The letter of extension was later amended to incorporate the terms of a Note from the Executive Secretary of 19 September 2005. That amendment is hereafter referred to as “the rider”. The aforementioned Note introduced a mechanism for considering whether an exception should be made to the Commission’s seven-year policy “because of the need to retain essential expertise or memory in the Secretariat”. In 2006 the complainant’s appointment could be further extended only if he fell within that exception.

3. The Executive Secretary’s Note of 19 September 2005 specified:

“The incumbent [of a post] will be considered for possible exceptional extension as a matter of course. The incumbent shall not present an application in response to the advertisement and the incumbent will not be interviewed.”

As explained by the Executive Secretary in a memorandum, also dated 19 September 2005, the “possibilities for an incumbent to gain an exceptional extension [...] are judged against what the general job market can offer”.

4. At or about the same time as the complainant’s contract was amended to include the rider, consideration was being given to the reorganisation of the Division in which he worked. It is clear that the contracts of a number of staff members whose posts were not to be retained were not amended to include the rider. The complainant assumed, because his contract was amended, that his post was to be retained and that he would be considered for possible extension. That assumption was doubtless underpinned by the statement by his

former division director in his Performance Appraisal Report, dated 21 October 2003, that if the complainant was not “given exception from the seven-year rule, the [Provisional Technical Secretariat] will have to pay extensive [sic] for the damage this will do in the [Radio Nuclide] area as a whole”.

5. On 20 December 2005, one hour before the complainant was to return to his home country for Christmas, his then division director informed him that, if he wished to be granted an exceptional extension, he had to accept the downgrading of his post to P-4. The complainant indicated that he would not accept that condition and, at the division director’s request, sent him an e-mail stating that he would not seek an extension to a P-4 post after November 2006. The complainant added that he reserved his rights “to question the legality of downgrading [his] position without even telling [him]”. It appears from a document provided to the Joint Appeals Panel, in response to its enquiry, that the then Executive Secretary may have accepted a recommendation for the downgrading of the complainant’s post as early as 5 January 2004. However, the Panel was not satisfied that any final decision had been made or implemented. Certainly, there is nothing to suggest that the decision was officially communicated to anyone, least of all to the complainant, who was advised of the downgrading only in December 2005 and then only in the course of a discussion as to the basis on which he would be considered for an exceptional extension.

6. On his return to work in January 2006, the complainant was informed that he had been transferred to the post of Acting Head, Waveform Development Unit. The complainant informed his division director that he did not assent to that course but, on 13 February 2006, a Personnel Bulletin announced that he had been so transferred. The Bulletin did not announce the transfer or appointment of anyone to the complainant’s previous post, nor did it announce that the post had been abolished. On the same day, 13 February, his division director asked the complainant if he would like to be considered for exceptional extension in the post to which he had been transferred. The

complainant rejected this idea and on that day, again at his division director's request, explained in an e-mail to him why he had tried to avoid being transferred to the post.

7. Two further matters should be noted. The first is that on 30 June 2006 a post was advertised for a Senior Radionuclide Officer. This post was substantially the same as that occupied by the complainant prior to his transfer. In this respect, the statements of duties and responsibilities were, for practical purposes, the same save for the specification of the supervising officer. The only difference in the required qualifications was that the advertised post specified ten years' experience in waveform and radionuclide monitoring, whereas the other specified seven years in radionuclide data processing. The second matter to be noted is that the complainant's performance appraisal report for the period ending 29 November 2005 was not completed until 23 May 2006 despite reminders by the complainant. In that report, the complainant's division director stated that his "strong experience and expertise has led management to recommend him for two years' exceptional extension in order to work on a knowledge transfer and establish a roadmap for continuity and integration of the [Provisional Technical Secretariat] development activities". However, in his concluding remarks, the director stated that as the complainant "gets to the end of his current contract, it is critical that the remaining months are focused on knowledge transfer issues".

8. On the same day as the division director completed the complainant's performance appraisal report, 23 May 2006, a Personnel Advisory Panel was constituted to consider the possible exceptional extension of his contract. The Panel met on 26 May and had before it the complainant's performance appraisal report as well as a recommendation dated 25 May from his division director that an extension not be granted.

9. In his recommendation the division director stated:

"Despite having received a rider at the time, it is now clear from a structural consideration that his post will be discontinued. Notwithstanding [his] good performance, the Radionuclide Development Unit Head function has been

reconsidered. As a result it has been decided that the management function of the Radionuclide Development Unit Head be discontinued: implementation of the change follows a memo from both the [...] Director [of the International Monitoring System Division and the Director of the International Data Centre Division] (REF: IDC/OD/00/PER/410/st/06) and approved by the Executive Secretary accordingly with the restructuring process.”

The director also pointed out that the complainant had expressed his intention not to be considered for the post in which he was then acting and concluded by stating that all efforts were being made to secure “a senior level post in [...] radionuclide development [...] in order to ensure continuity”.

10. The Personnel Advisory Panel, without giving reasons, unanimously recommended on 26 May 2006 that an extension not be granted to the complainant. That recommendation was accepted by the Executive Secretary in a typed “Note for the Files” dated 24 May 2006 and was communicated to the complainant on 26 May.

11. At this stage it is pertinent to make two observations with respect to the proceedings before the Personnel Advisory Panel. The first is that, as the matter was presented to the Panel, there was no basis for the application of the terms of the Note of 19 September 2005. The only question was whether there was a need to retain the complainant’s expertise notwithstanding that he did not seek an extension in relation to the post in which he was then acting and that there was no suggestion that he could be appointed to any other post. The second matter to be observed is that the recommendation of the complainant’s division director did not accurately reflect the terms of the memorandum referenced as IDC/OD/00/PER/410/st/06.

12. The memorandum to which the complainant’s division director referred is dated 17 January 2006 and was provided to the Joint Appeals Panel pursuant to a request by it. That memorandum did not refer either to the discontinuation of the complainant’s post or to the discontinuation of the management functions associated with it. So far as is presently relevant, it merely stated that the complainant,

“currently Head of Radionuclide Development Unit is transferred [...] as Acting Unit Head of the future Scientific Methods Unit”. There is also an inconsistency between the statement with respect to efforts being made to secure a senior level post in radionuclide development and the terms of the memorandum of 17 January 2006. That memorandum clearly stated that “[a] senior radionuclide officer position will be created to lead potentially the development of radionuclide related technologies”. In his recommendation of 25 May 2006, the complainant’s division director stated that the memorandum of 17 January 2006 had already been approved by the Executive Secretary. Leaving aside the question whether what subsequently occurred was the creation of a new post, that statement is to be accepted. Approval of the memorandum is implicit in the Personnel Bulletin issued on 13 February 2006 announcing the various transfers specified in the memorandum, although it made no reference to a senior radionuclide officer post. Moreover, the Commission has not at any stage suggested that the post in question was not approved when the transfers were approved. Its approval at that stage is consistent with the statement made in answer to enquiry by the Joint Appeals Panel that “[t]he decision to advertise a post as Senior Radionuclide Officer at the P5 level was provisionally made in mid-June 2005 [...] [and t]he ultimate decision to advertise the post was made on 28 June 2006” (emphasis added). Thus, the position with respect to the post of senior radionuclide officer was considerably further advanced than suggested by the statement in the division director’s recommendation of 25 May 2006.

13. The advanced nature of the proposal for a post at level P-5 to deal with radionuclide development – an area in which the complainant had undoubted expertise – and the vacancy announcement for which, when it was issued on 30 June 2006, was, for practical purposes, the same as that for the post which he previously occupied, was material to the question whether there was a need to retain his expertise. Its materiality is highlighted by subsequent events to which reference will shortly be made. For the moment, however, it is sufficient to observe that, as the advanced nature of the proposal was not brought to the

attention of the Personnel Advisory Panel, it failed to have regard to a material consideration. And as the Executive Secretary's decision not to grant an exceptional extension was based in part on the Panel's recommendation, that decision was flawed.

14. The complainant's case has never been simply a case based on failure to have regard to a material consideration. Rather, his case, as stated in his internal appeal, is that there "was a clear fraud" and that the decision in question involved a "severe breach of the general principle of [the] law of mutual trust". In his complaint it is put, by reference to the same facts elaborated in his internal appeal, that his division director engaged in actions "to nullify the Rider process in [his] case".

15. Before turning to the complainant's arguments, it is convenient to note certain matters that occurred after the meeting of the Personnel Advisory Panel. The first is that the complainant was informed by memorandum of 26 May 2006 that he would not be granted an exceptional extension. It was said in that memorandum:

"The decision to discontinue your post as part of the restructuring [...] has in this respect been noted, as well as the fact that mechanisms are in place to ensure continuity of knowledge, expertise and institutional memory."

As earlier indicated, the memorandum of 17 January 2006 did not refer to the discontinuation of the complainant's post. Moreover, there is nothing in the dossier to suggest that a decision to that effect was taken at any time prior to the memorandum of 26 May 2006. Further, the only mechanism suggested by the complainant's division director in his recommendation of 25 May for ensuring continuity was that efforts were being made to secure a senior level post in radionuclide development.

16. In rejecting the complainant's request for review of the decision of 28 August 2006 not to grant him an exceptional extension, the Executive Secretary offered additional reasons, including:

"I particularly note that your post will not be continued exactly in its current form and at its current grade, and that you did not want to be considered for the lower graded post."

That statement presupposes that the complainant's post was to be continued, albeit in a different form and at a different grade. Moreover, by that stage, a post that did not materially differ from that of the complainant had already been advertised at level P-5.

17. On 14 November 2006, shortly before the complainant's contract was to expire, the complainant's division director forwarded a memorandum to him, stating, amongst other things:

“Since your position of Unit Head, Radionuclide Development is discontinued in the current structure of the [International Data Centre Division], we have agreed to assimilate you as an incumbent for the position of Senior Radionuclide Officer, at P-5 level, the filling of which is currently under consideration.”

The complainant responded on 17 November, pointing out that his household had been shipped back to his home country and that he had entered into a new contractual arrangement with his previous employer. He concluded by saying that he could not indicate whether he wished to be considered for the post unless the termination decision of 26 May 2006 was withdrawn.

18. The complainant's division director recommended, on 24 November, that the complainant be granted an exceptional extension for a further 18 months. In so doing, he stated that a recent nuclear test in the Democratic People's Republic of Korea “ha[d] put a lot more pressure on the [Provisional Technical Secretariat] with regards to speeding the [radionuclide] development especially Noble Gas issues”. A Personnel Advisory Panel met the same day. In its report of 27 November, it stated that it “did not reach consensus on the recommendation of the Director” but expressed the view that:

“as [the complainant] was considered as incumbent for th[e] position [he] would [...] automatically be entitled to a 6-month contract extension beyond the expiry date of 29 November 2006, in lieu of notice.”

19. The complainant left Vienna to return to his home country on 22 November. Shortly after his arrival, he received a memorandum dated 28 November informing him that the Executive Secretary had decided to grant him an exceptional extension until 29 July 2008.

The complainant did not accept that offer as he was returning to employment from which he had been granted leave without pay during his time with the Commission and further leave could not be granted. In this last regard, it seems that leave would have been extended had the matter been raised before the termination of another employee to make way for the complainant's return.

20. The final matter to be noted is that the Executive Secretary gave two reasons for rejecting the complainant's internal appeal. The first, which related to the recommendation for payment of material damages, was the complainant's failure to accept the "bona fide offer [...] to extend [his] contract by 20 months on 28 November 2006". In that regard, he found it "unsustainable" to pay compensation without having the benefit of the work the complainant had indicated his willingness to provide by launching his appeal. The second reason related to the recommendation with respect to moral damages, it being said:

"I have demonstrated in words and action that I consider your contributions to the Commission of the highest value, and I trust that any complaint you may have had has been cured by my stated high regard and my offer to extend your contract. Hence I cannot agree to the payment of moral damages."

21. In essence, the reason given for rejecting the complainant's internal appeal was that any damage he might have suffered had been remedied by the subsequent actions of the Executive Secretary. However, in its submissions to the Tribunal the Commission raises further arguments. In particular, it contends that there is no right to have a fixed-term contract extended, much less by way of exception to the seven-year policy, and that it is for the Executive Secretary to determine whether to grant an exceptional extension having regard to the interests of the Commission. So much may be accepted, but it does not address the substance of the complainant's claim, a point which is made in his rejoinder where he sets out his claim in these terms:

"[The Commission] continues to pretend that I am challenging that I was not given an extension, when what I clearly contest is that the procedures set out in my contract (including the rider) was [sic] not followed and every



step possible was taken by the [...] Director [of the International Data Centre Division] to nullify my rights to be compared to the job market.”

22. In his complaint, the complainant contends that the initial decision not to grant him an exceptional extension involved an error of law because it “did not follow the rules set out in [his] contract after [he] had signed the rider”. The Commission counters this by arguing that “[t]he rider [...] did not by itself, nor did it purport to, set forth any procedures for advertising posts” and that its action in proceeding other than in accordance with the rider “was fully justified by the fact that the Complainant’s post was, upon the expiry of his fixed-term appointment, to be discontinued in the form and at the grade it [then] existed”. That statement indicates that the complainant’s post was to be modified not that it was to be discontinued, as stated in the division director’s recommendation of 25 May 2006 and in the memorandum of 26 May informing the complainant that his contract was not to be extended. As earlier indicated, a post, which was identical to the complainant’s post save for the specification of supervisor and the designation “Head [of] Unit” – differences which are entirely explicable on the basis of the restructuring – was advertised on 30 June 2006 at precisely the same grade as the complainant’s post. There is no evidence of a recommendation, much less a formal decision to discontinue the complainant’s post. In the absence of evidence to that effect, it is to be concluded that the post advertised on 30 June was the post occupied by the complainant prior to his transfer in February 2006, albeit with a slightly different title. Further, as the complainant was merely acting in the post of Head of the Waveform Development Unit, he was the incumbent of that previous post. As the incumbent, he was entitled to have the procedures set out in the Executive Secretary’s Note of 19 September 2005 properly observed.

23. Although it is correct, as the Commission contends, that the rider does not establish procedures for advertising posts, its contractual obligation in this case was to ensure that the complainant’s post was advertised and that the question of his extension was determined in accordance with the Note of 19 September 2005. If those procedures could not be completed by 29 November 2006, when the

complainant's contract was due to expire, then an extension should have been granted to enable that course to be taken. Were it otherwise, the Commission could wholly circumvent the obligations it assumed by virtue of the Note of 19 September 2005.

24. The failure of the Commission to advertise the complainant's post and to follow the procedures required by the rider to his contract deprived him of a valuable opportunity to be considered for exceptional extension against what the market could offer. He is to be compensated for that lost opportunity. That does not mean that he is to be compensated on the basis that his contract would have been extended for three years. Subsequent events have revealed exactly what would have happened had he been given the opportunity to which he was entitled, namely, his contract would have been extended for 20 months. Further, it is not correct, as the Commission contends, that the loss suffered by the complainant was due to his rejection of the offer of extension made in November 2006. The Joint Appeals Panel correctly found that that offer was "unrealistic": so far as concerns the question of compensation, it is properly described as "valueless". Accordingly, the complainant is entitled to compensation for his lost opportunity equivalent to the net salary, including step increases and other benefits, he would have received if his contract had been extended to 29 July 2008, less any income earned by him as a result of employment between 29 November 2006 and 29 July 2008. The resulting sum should bear interest at the rate of 8 per cent per annum from 29 November 2006 until the date of payment.

25. The Joint Appeals Panel recommended the payment of moral damages in the sum of 20,000 United States dollars for:

"raising the expectations of the [complainant] that he may be eligible for a possible extension of his contract on the basis of the Note of the Executive Secretary that [...] implied the continuation of his position; reasonable presumption of having caused the [complainant] to feel humiliated and threatened by oral proposals of downgrading his post; the numerous anomalies in [...] relation to [his performance appraisal report]; the lack of application of the rider policy; the advertising of a P5 post matching [his] earlier job description, and the circumstances in which the 20-month extension was ultimately offered."

That recommendation was made in a context in which the Joint Appeals Panel found that “the documentation on job numbers, grades, descriptions and changes thereto in relation to [the complainant’s] case was poor, inconsistent and often contradictory” and that there were “irregularities” in relation to the formation and proceedings of the Personnel Advisory Panel. Those irregularities were identified as the signing by the Executive Secretary of the relevant “Note for the Files” dated two days before the Personnel Advisory Panel met, the delay in completing the complainant’s performance appraisal report, including the division director’s query as to whether there was any need for the report, the misstatement of his position in the memorandum setting up the aforementioned Panel, and the lack of clarity as to the basis on which it considered his expertise and memory.

26. Not all of the complainant’s contentions are to be accepted, including his claim that there was a “threat” to downgrade his post, his characterisation of the actions of his division director as “mobbing and harassment” and his claim that members of the Personnel Advisory Panel were biased against him. However, the findings that his post was not to be discontinued but simply modified, conformably with the reply of the Commission, and that the post advertised on 30 June 2006 was, in substance, the post occupied by him prior to his transfer, make it difficult to characterise a number of the matters upon which he relies as either carelessness or an irregularity. Rather, they point to the accuracy of his contention that the division director set about nullifying his right to have the question of his extension considered in accordance with the Executive Secretary’s Note of 19 September 2005.

27. The fact that the complainant was asked to accept the downgrading of his post, although it was subsequently advertised at P-5, the division director’s requests that he indicate by e-mail that he would not accept an extension at the P-4 level and, later, that he would not seek an extension in the post to which he was transferred in an acting capacity, the division director’s failure to complete his performance appraisal report until shortly before the Personnel Advisory Panel met and the haste in which that Panel met and a

decision was taken, all suggest that the division director contrived a situation in which the question of extension would be considered other than in accordance with the Executive Secretary's Note. When these matters are taken in conjunction with the inaccuracies in the complainant's division director's recommendation of 25 May 2006, particularly the statement that the complainant's post was to be discontinued, it is properly to be concluded that the division director did set out to nullify the complainant's contractual right. In other words, he acted in bad faith or, as claimed by the complainant in "breach of the general principle of [the] law of mutual trust". This, the subsequent advertising of the senior radionuclide post at the P-5 level, as well as the valueless offer to extend the complainant's contract at the last minute – an offer made, according to a statement in the reply of the Commission, because of a reassessment of its needs after the nuclear event in the Democratic People's Republic of Korea, but relied upon as the foundation of an argument before the Joint Appeals Panel that the internal appeal was moot and, later as the basis for rejecting its recommendation with respect to compensation – warrant an award of moral damages in the amount of 25,000 euros, rather than the amount recommended by the Joint Appeals Panel.

28. The complainant is also entitled to an award of costs in the amount of 1,000 euros, as requested in his complaint.

## DECISION

For the above reasons,

1. The decision of 13 July 2007 is set aside.
2. The Commission shall pay the complainant by way of compensation an amount equal to the net salary, including step increases and other benefits, he would have received if his contract had been extended to 29 July 2008, less his earnings from employment during the period 29 November 2006 to 29 July 2008, together with interest on the resulting sum at the rate of

8 per cent per annum from 29 November 2006 until the date of payment.

3. The Commission shall pay the complainant moral damages in the amount of 25,000 euros.
4. It shall also pay him 1,000 euros in costs.
5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 6 November 2008, 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 4 February 2009.

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