113th Session **Judgment No. 3126**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr V.C. B. against the European Free Trade Association (EFTA) on 7 May 2010, EFTA's reply of 24 August, the complainant's rejoinder of 19 November 2010 and the Association's surrejoinder of 4 March 2011;

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 is an Irish national born in 1969. He joined EFTA in February 2008 as a Senior Building Supervisor under a three-year fixed-term contract at grade B6. At the end of his six-month probationary period, his appointment was confirmed, although his supervisor had raised concerns regarding in particular his communication style.

The complainant's duties included supervising two receptionists. For several years prior to his recruitment, when either of the

receptionists had been absent, EFTA had frequently engaged a person, a former staff member, under temporary contracts to replace them. The complainant considered this person to be unsuitable for the position and he objected to the fact that she was remunerated at a higher rate than the permanent receptionists. As from the summer of 2008 he sought to put an end to this arrangement.

Matters came to a head on 4 February 2009 when, during a meeting with the Deputy Secretary-General and the Senior Human Resources Officer, he refused to accept their decision to recruit the same person to replace one of the permanent receptionists who was to be seconded to another division for a short period of time. The following day the complainant wrote an e-mail to the Deputy Secretary-General referring to that meeting but not to their discussion during the meeting; instead, he criticised the appointment of the Senior Human Resources Officer. On 12 February he met with the Deputy Secretary-General and was reprimanded orally for his attitude, which was perceived as aggressive and insubordinate. The Deputy Secretary-General handed him a note summarising their discussion and asked him to sign it. The complainant refused, arguing that the note was not valid as it was not signed by the Deputy Secretary-General herself. On 9 March the complainant had a meeting with the Deputy Secretary-General for a performance evaluation during which he was informed that his step increase, which was due in February 2009, had been withheld because of his attitude. In the event, the step increase was granted in May, as agreed, since the situation had not deteriorated further. Later in May the complainant requested the Senior Human Resources Officer to recruit a receptionist to replace temporarily the permanent receptionist who had a half-day training. The request was rejected and e-mails were exchanged in that respect, between the aforementioned officer, the Deputy Secretary-General and the complainant. The latter criticised the refusal to find a replacement and stated, in an e-mail of 4 June, that “there [was] no remedy to stupidity”.

On 5 June 2009 the Secretary-General notified the complainant that, in accordance with Staff Regulation 19.1(b), his contract was

terminated with immediate effect for serious misconduct and that he was no longer allowed access to EFTA's premises. However, his emoluments would be paid until 5 September 2009. The Secretary-General noted inter alia that he had been warned orally on several occasions and that he had received a written censure on 12 February concerning his repeated refusal to obey instructions and to carry out certain duties in accordance with his job description, and his use of inappropriate language in his communications with other staff members.

On 12 June the complainant informed the Secretary-General that he intended to refer the matter to an Advisory Board unless an amicable solution was found and, on 12 July, he wrote to the Staff Committee requesting that an Advisory Board be set up. He indicated that he was open to mediation. The following day the Staff Committee forwarded his request to the Secretary-General. The possibility of an amicable settlement was discussed during the summer but, since no agreement was reached, an Advisory Board was set up.

The Board met on 10 December 2009. A majority of its members issued an opinion on 26 February 2010 recommending that the dismissal decision be upheld as it was justified on the basis of the complainant's misbehaviour. They noted that the complainant had not been summarily dismissed, as he had been paid emoluments during a period corresponding to the normal period of notice. The majority further held that an individual termination decision lay within the Secretary-General's sole competence and that no consultation of the Staff Committee was required. On the same day a dissenting opinion was issued by the members representing the Staff Committee. They considered that, in accordance with Staff Regulation 45, the Secretary-General should have convened a Consultative Body and hence consulted the Staff Committee prior to taking the dismissal decision. In their view, the complainant's case did not constitute an emergency situation warranting a waiver of the consultation process. Considering that the dismissal decision was procedurally flawed, they recommended that an amicable solution should be found with the complainant.

By a letter of 3 March 2010, which is the impugned decision, the Secretary-General informed the complainant that the dismissal decision was maintained on the grounds that the majority of the members of the Advisory Board upheld his decision and accepted the reasons he had given in the letter of 5 June 2009 to justify it.

B. The complainant firstly contends that the dismissal decision was unfair, particularly because he received no prior warning. He contests the validity of the written censure on the grounds that it is not signed by its author, nor otherwise authenticated; he stresses that he never agreed to its content and did not sign it. Concerning the alleged oral reprimand he received, he indicates that, according to Staff Rule 44.3, this is not a disciplinary measure. Consequently, before receiving the letter of 5 June 2009, he was not aware that his behaviour constituted serious misconduct. He also contests the decision not to pay him the termination indemnity, as the two conditions prescribed by Staff Regulation 20.3 for not paying it – misconduct and unsatisfactory services – were not met in his case. Indeed, his services were not considered unsatisfactory.

Secondly, he submits that the dismissal decision was disproportionate, explaining that he never refused to follow instructions given by his supervisors. He argues that his allegedly inappropriate comments in the e-mail of 5 February 2009 may be controversial but under no circumstances do they constitute serious misconduct. He adds that the e-mails in which he supposedly used inappropriate language were replies to provocations; moreover, some of the objections he raised and which were considered offensive were made in his capacity as a manager. In addition, the dismissal decision involved a breach of the rule against double jeopardy: the decision to withhold his step increase was a sanction for his e-mail of 5 February, and as his dismissal is also based on that e-mail, he was punished twice for the same offence.

Thirdly, the complainant alleges several “procedural flaws” in the internal appeal proceedings. He contends inter alia that he was denied due process since no Consultative Body was set up. In that respect he

draws attention to the dissenting opinion of the Advisory Board. He also questions the neutrality of some of the members of the Board. He points out that the Board did not issue its opinion within 60 days of receipt of his internal submissions, as required by Staff Regulation 47: the Board received them on 2 December 2009 and issued its opinion on 26 February 2010.

Fourthly, he contends that EFTA displayed bad faith, since the alleged written censure was not intended to be recorded. Indeed, the Deputy Secretary-General told him that it would not be put in his personal file but kept as a precautionary measure. Moreover, his step increase was due on 1 February 2009, i.e. before he wrote the e-mail of 5 February which, according to the Deputy Secretary-General, was the reason for withholding it. He also contends that the Senior Human Resources Officer acted in bad faith in refusing some of his requests for staff replacements or training opportunities for members of his team.

Lastly, he asserts that EFTA acted in breach of its duty of care, in particular when threatening members of his former team with dismissal if they were found interacting with him after he was dismissed. He adds that his good name was tarnished and that he was prejudiced by the Association's attitude as he is unemployed and deprived of health insurance coverage.

The complainant asks the Tribunal to set aside the impugned decision and to order the Association to withdraw the allegation of serious misconduct made in the letter of 5 June 2009. He seeks payment of emoluments for the period from September 2009 to 31 January 2011 (when his contract was due to expire had he not been dismissed), payment of an amount equivalent to half of the emoluments he would have received had his contract been renewed, payment of the termination indemnity and payment of an amount equivalent to three months' step increase. He also claims moral damages in the amount of 50,000 euros, costs and a "symbolic retribution to the permanent receptionists". He further asks the Tribunal to order EFTA to issue a recommendation letter and a statement restoring his good name, which should be published on the

Association's intranet, and to lift the ban prohibiting his former team from interacting with him.

C. In its reply EFTA asserts that the dismissal decision was justified. It explains that, in accordance with Staff Regulation 19.1(b), the Secretary-General may terminate the appointment of a staff member for misconduct and that no termination indemnity was due to the complainant. Indeed, the situations foreseen in Staff Regulation 20.3 for not paying that indemnity are alternative and not cumulative.

According to the Association, the evidence clearly established misconduct beyond reasonable doubt. It states that the complainant was given several oral warnings, as well as a written one, and that he had ample opportunities to improve his behaviour. Moreover, the written warning of 12 February was valid since there is no evidence that it did not accurately reflect the decision of the Deputy Secretary-General and of the Secretary-General. It points out that this warning was attached to a note signed by the Deputy Secretary-General herself by which she confirmed that the Secretary-General had approved the text. It adds that applicable rules do not require that a written warning be issued before a disciplinary sanction is taken.

The defendant contends that the sanction of dismissal was proportionate. In this regard it emphasises that, notwithstanding the wording of the letter of 5 June 2009, the complainant was not summarily dismissed, as he was paid three months' emoluments. His constant and recurrent insubordination and insulting behaviour warranted his dismissal. The decision to prohibit him from entering EFTA's premises was also justified, given that one of his responsibilities was to manage the security of the building, which meant that he had all the keys to the Association's premises and might have used them to access confidential documents. EFTA also considers that the decision to withhold his step increase was justified given his "outrageous behaviour" in February 2009. It denies having breached the rule against double jeopardy, explaining that the dismissal decision was taken because the complainant's behaviour did not improve following the warning of 12 February. It adds that as a

gesture of good will and in order to try to improve the working relationship, the complainant's step increase was granted in May 2009.

Regarding the alleged procedural flaws, EFTA submits that the Consultative Body is not competent to examine individual cases of termination and that, even if it were considered to be competent, the emergency clause in Staff Regulation 45.5 would have applied. Indeed, the complainant repeatedly used aggressive and insulting language, which was problematic given that he was in charge of the security of the building and of welcoming visitors. It adds that he was heard by the Advisory Board and that, consequently, the requirement of due process in the internal appeal proceedings was met. Moreover, the Secretary-General did consult the Staff Committee, albeit informally, concerning the complainant's case.

The defendant denies any bad faith, pointing out that it proposed an amicable settlement. Lastly, concerning the allegation that it breached its duty of care, it submits that the complainant has no legal standing to claim compensation for third parties, i.e. members of his former team; that claim should consequently be dismissed.

D. In his rejoinder the complainant reiterates his arguments. However, he acknowledges that he has no *locus standi* to claim compensation on behalf of third parties and therefore withdraws his claim for compensation for the receptionists.

He contends that some of the documents EFTA appended to its reply were disclosed to him for the first time in the proceedings before the Tribunal, and he contests the authenticity of some of them. He denies having insulted people. In light of the "serious groundless and calumnious accusations" made by the defendant in its reply, the complainant seeks an additional 100,000 euros in moral damages, and he asks that the Association be ordered to pay him emoluments "equivalent to the complete period of [his] second contract", instead of half of those emoluments as initially claimed. He also requests that any monetary compensation granted to him be "capitalized from the 6th of September 2009 at the appropriate rate for moratory interests".

E. In its surrejoinder EFTA maintains its position and takes note of the complainant's decision to withdraw his claim concerning third parties. It contends that his two new claims for compensation are inadmissible, having been raised for the first time in the rejoinder, and that in any event they are devoid of merit.

CONSIDERATIONS

1. The complainant is a former staff member of EFTA. He was employed as Senior Building Supervisor from 1 February 2008 until 5 June 2009 when he was dismissed with three months' pay in lieu of notice on the ground of serious misconduct. The reasons given for his dismissal were his repeated refusal to obey instructions, failure to carry out certain duties in accordance with his job description and the use of inappropriate language in his communications with other staff members, including the Deputy Secretary-General and the Senior Human Resources Officer. The complainant referred the dismissal decision to the EFTA Advisory Board and, acting on the majority opinion of the Board, the Secretary-General confirmed the decision on 3 March 2010. The complainant thereafter initiated the present proceedings seeking material and moral damages and other relief, including annulment of the "allegations" of serious misconduct.

2. Although the complainant challenges their significance and the extent, if any, to which the Association may rely upon them, the events leading to the complainant's dismissal are not in dispute. Those events revolve around the employment of a temporary receptionist whose rate of pay apparently exceeded that of other permanent receptionists and who, in the complainant's view, was not suitable for the position even though she had previously been regularly employed in that capacity. On 4 February 2009 the complainant attended a meeting with the Deputy Secretary-General and the Senior Human Resources Officer at which he was informed that the person concerned would be employed as a temporary replacement for a receptionist who was to be seconded to another division. It is stated in a note handed to

the complainant at a subsequent meeting on 12 February that, at the 4 February meeting, he "refused to agree to the arrangement suggested and would not work with the proposed replacement in the reception unless forced to do so". It was also stated in that note that his behaviour on 4 February was "improper and alarming" and his "language [...] totally unacceptable". The complainant acknowledges in his complaint that he "totally disagreed with what was unilaterally being imposed on [him]" at the 4 February meeting and, in a subsequent communication to the Deputy Secretary-General, headed "Gentleman's Agreement", he accepted that he had "adopted a defined emotional state and negotiating tactic" and that it was "socially unconventional, and the boldness of it was experienced negatively by the [other] participants".

3. On 5 February 2009 the complainant sent an e-mail to the Deputy Secretary-General referring to the meeting of 4 February but not to what then occurred. Instead, he used the occasion to criticise the appointment of the Senior Human Resources Officer, questioning her qualifications and suggesting that she had been appointed because of her friendship with another staff member so that she could "milk the EFTA cash cow while acting as a puppet on a string". In that context, he stated, amongst other things, that "[a]pparently transparency, separation of power and conflict of interest are 'avant gardiste' concepts to EFTA" and indicated that, if he had any further "[human resources] matters of importance", he would refer them either to the Deputy Secretary-General or another named senior staff member.

4. The complainant was called to a meeting with the Deputy Secretary-General on 12 February 2009 when he was handed the note to which reference has already been made. It was stated in that note that, as well as his behaviour at the meeting of 4 February which was improper, the language of his e-mail of 5 February was inappropriate and degrading. It was also said that he needed to understand that his role did not extend to various activities, including recruiting or interfering in recruitment processes unless invited to do so. The

note concluded with the statement that the complainant's behaviour on 4 February and the e-mail of 5 February were inconsistent with the culture of EFTA and its Staff Regulations and Rules and that similar incidents would not be tolerated and would have serious consequences for his further employment. Although requested to do so, the complainant refused to sign the note.

5. In March 2009, shortly after the events referred to above and, probably, because of them, the complainant met with the Deputy Secretary-General for a performance evaluation. It is stated in a note of that meeting which is wrongly dated 9 February 2009 that the complainant was:

> "1. Not to interfere in processes or issues not related to the portfolio of the senior building supervisor.
>
> 2. Not to send out emails entailing negative comments about staff in general or the decisions, actions of his superiors, or undermine them or their instructions in any other way."

As a result of his performance evaluation, the complainant's step increase was withheld for a period of almost three months. The complainant also refused to sign the note concerning his performance evaluation. In an e-mail of 20 May 2009 to the Deputy Secretary-General concerning the step increase, the complainant indicated that he had "personally sought and selected two candidates, remunerated at the standard going rate for reception". It is acknowledged in the complaint that one such hiring took place on 26 March 2009.

6. In late May 2009 the complainant requested the Senior Human Resources Officer to hire an external replacement receptionist for a half day. His request was refused and he was instructed to cover the absence of the permanent receptionist from within his own team. When he indicated that this was not possible, the Senior Human Resources Officer said that she, herself, would cover the receptionist's absence. Although this proved unnecessary, her statement that she would cover the absence prompted an e-mail from the complainant to her and the Deputy Secretary-General, dated 27 May 2009, comparing

her "heroic and noble gesture" to "a Wagnerian drama" with a postscript adding that she might "want to brush up on [her] English and French as it [was] not at the standard level required on reception". A little later, on 3 June, the Senior Human Resources Officer sent an e-mail to various named persons, including the complainant and the Deputy Secretary-General, indicating that the person to whom the complainant had objected at the meeting of 4 February 2009 would be engaged to provide temporary service as a receptionist on 8, 9 and 10 June. The following day, 4 June, the complainant sent an e-mail to the same persons and two others in which he stated that he, himself, would seek "adequate replacement" and that the presence of the person proposed by the Senior Human Resources Officer was "unsolicited and [would] be considered as hostile on [the] ground floor and reception". He began the e-mail with the statement that "[r]eception is not a sanctuary for incompetents, an elephant cemetery, a waste recycling unit or a circus freak show" and concluded with the observation that "there is no remedy for stupidity". This e-mail was the immediate cause of his dismissal.

7. Before turning to the complainant's arguments it is convenient to note three matters. The first is that the notice of dismissal referred to "serious misconduct" and was said to be with "immediate effect". Staff Regulation 44 relevantly provides:

> "1. Misconduct shall be understood to mean any improper action by a staff member in the performance of his duties, any violation of his duties as a staff member, any improper use of his position as a staff member for his personal advantage or any other conduct which tends to bring either the Secretariat or the Association into disrepute.
>
> 2. A staff member who is guilty of misconduct or whose work is deemed unsatisfactory may be subjected to sanctions in accordance with the disciplinary rules laid down by the Secretary-General. In cases of serious misconduct such sanctions may include summary dismissal.
>
> 3. Entitlement of a staff member summarily dismissed to his emoluments shall cease on the date of his dismissal."

As the complainant was paid emoluments for a period of three months following notice of his dismissal, he was not summarily dismissed.

8. The disciplinary measures are laid down in Rule 44 which is referred to in Staff Regulation 44 as consisting of "written censure, suspension without emoluments, demotion or summary dismissal for misconduct". However, Staff Rule 44, paragraph 4, refers to termination in accordance with Staff Regulation 19.1. That Regulation relevantly allows, in paragraph (b), that the Secretary-General may terminate the appointment of a staff member "for misconduct or disciplinary reasons in accordance with Regulation 44". Staff Regulation 19.2 requires three months' written notice of termination together with a statement of the grounds. It is clear that the complainant's appointment was terminated under Staff Regulation 19. Accordingly, the question is not whether his conduct constituted "serious misconduct", but whether it amounted to misconduct.

9. The second matter that should be noted is that, in the proceedings before the Advisory Board and in these proceedings, the Association has raised matters in purported justification of the complainant's dismissal that go beyond the grounds specified in the notice of dismissal. This is not permissible. To allow that course would seriously infringe on a staff member's right to be heard before a disciplinary measure is imposed. Accordingly, the Tribunal will consider only those grounds specified in the notice, namely, refusal to obey instructions, failure to carry out duties and the use of inappropriate language.

10. The third matter that should be noted is that the only matter referred to in the papers that is capable of constituting a failure by the complainant to carry out his duties is his failure to drive the Secretary-General on a particular occasion. The matter is neither dealt with in the majority opinion of the Advisory Board nor in the Association's pleadings. The complainant has provided an explanation of the incident and, in these circumstances, it must be held that the Association has failed to establish that he refused "to carry out certain duties in accordance with [his] job description". Moreover, it appears from the dissenting opinion of the Advisory Board that there was, in fact, no job description.

11. The complainant raises a number of other matters that he argues constitute "procedural flaws". It is convenient to deal with three of these matters before turning to the complainant's other arguments. The first is the note prepared following the performance evaluation of March 2009 and the second is the withholding of his step increase. The complainant does not deny that he received the aforementioned note or that it contained the statements set out in consideration 5 above. However, he contends that the performance evaluation did not follow required procedures and that the withholding of his step increase was unlawful. Neither the performance evaluation nor the withholding of the step increase can be challenged in these proceedings. In this regard, it appears from a letter from the complainant to the Secretary-General dated 1 September 2009 that the claim made against the Association and referred to the Advisory Board concerned only the dismissal decision of 5 June 2009. Accordingly, that is the only matter properly before the Tribunal.

The third "procedural flaw" upon which the complainant relies concerns the note of 12 February. In the notice of dismissal of 5 June 2009 reference is made to that note, it being said that "[o]n 12 February [the complainant] received a written censure in the form of a note […] attached to this letter". The complainant contends that that note is "not signed, not dated and unreferenced" and that "the author is unknown". He also claims that a sentence recording receipt of the note was later modified. Further, he points out that he "never agreed with its content and never signed it". In these circumstances, he contends that the note of 12 February is "invalid, cannot be considered as evidence and cannot be relied upon to justify the disciplinary measures that followed". This argument must be rejected. The relevant facts are those of 4 and 5 February 2009 and they are not denied. Moreover, the complainant neither denies that he received the note of 12 February 2009 nor that it contained the statement that "similar incidents […] would have serious consequences for [his] further employment".

12. The complainant also contends that there were "procedural flaws" that constitute a denial of due process. The first of these

"flaws" concerns the statement in the notice of dismissal of 5 June 2009 that "on several occasions [he had] been warned that [his] behaviour represent[ed] serious misconduct in relation to the Staff Regulations and Rules". The complainant correctly points out that the only warning was that contained in the note of 12 February 2009 and that that note did not refer to "serious misconduct". However, there is no doubt that the note contained a warning of serious consequences for his further employment. In these circumstances, the misstatement in the notice of dismissal provides no basis for the argument that the complainant was denied due process because he had not been warned that he was at risk of dismissal.

13. Secondly, it is argued that the complainant was denied due process at the time of his dismissal. In this regard, he claims that he was not warned that his contract "was in the process of being terminated", no member of the Staff Committee was present, he was "not presented with any evidence to challenge" and the "charges […] were not clarified". The Association has not addressed these matters in its pleadings. Rather, it simply submits that the Advisory Board "gave [the complainant] a proper hearing" and, thus, "[d]ue process has […] been respected". This argument will be considered later. For the moment, it should be noted that, although the basic facts were not disputed, the complainant should have been given an opportunity before he was dismissed to have a member of the Staff Association present (Staff Regulation 45.3), and to put an argument that his actions did not constitute serious misconduct or, even, misconduct, and that, even if they did, he should not be dismissed.

14. Thirdly, the complainant contends that he was denied due process because there was no Consultative Body as required by Staff Regulation 45.6. Staff Regulation 45.4 requires that the Staff Committee, which is the elected Committee of the Staff Association, be consulted on various matters, including terminations. Except for instructions to meet emergencies, any proposed action on the matters specified in Staff Regulation 45.4 must be notified to the Staff

Committee before action is taken (Staff Regulation 45.5). Staff Regulation 45.6 provides:

> "Consultations referred to in paragraph 4 shall take place within a Consultative Body consisting of staff representatives, on the one hand, and the Secretary-General or his representative, on the other. [...] This Consultative Body shall meet at regular intervals, and shall, in the case of disagreement, record the differences of opinion."

Staff Regulation 46 provides inter alia that "[a]ny staff question which has not been settled within the [Body] referred to in Regulation 45.6 within 30 days after referral may be referred by the Secretary-General, the Staff Committee or the staff member directly concerned [...] to an Advisory Board".

15. In the present case, the Staff Committee was notified before action was taken to terminate the complainant's appointment and, as a result of consultation between the Secretary-General and members of the Staff Committee, a decision was taken to terminate the complainant's appointment with notice, rather than to dismiss him summarily. Although Staff Regulation 45.6 requires regular meetings, it does not require any particular formality save for the making of a record in the case of disagreement. Moreover, Staff Regulation 46 does not make a meeting of the Consultative Body a precondition to the referral of a matter to the Advisory Board. In these circumstances, and given that the Staff Committee was consulted by the Secretary-General, the complainant's argument based on Staff Regulation 45.6 must be rejected.

16. The complainant's argument with respect to due process also encompasses various matters with respect to the proceedings before the Advisory Board, including possible conflict of interest. His arguments in this regard are purely speculative and must be dismissed.

17. It is also argued that the decision to terminate the complainant's appointment involved a breach of the rule against double jeopardy. In that regard, the complainant claims that he was

punished for his e-mail of 5 February 2009 by the withholding of his increment and that "[b]y terminating [him] on the basis of these same events", he is being punished twice for the same offence. The rule against double jeopardy does not prevent disciplinary and non-disciplinary consequences attaching to the same acts or events. However, it does preclude the imposition of further disciplinary measures for acts or omissions that have already attracted a disciplinary sanction. As a written censure is a disciplinary measure (Staff Rule 44), the events of 4 and 5 February could not be used as a basis for the termination of the complainant's appointment. This is not to say that regard could not be had to those events to determine the seriousness of subsequent similar conduct and the likelihood of its recurrence.

18. As already indicated, the Association has not established that, as set out in the notice of dismissal, the complainant failed to carry out duties in accordance with his job description and it cannot rely on the events of 4 and 5 February to justify the termination of the complainant's appointment. However, and insofar as it was stated in the notice of dismissal that the complainant "repeatedly refused to obey instructions from [his] superiors", it is clear that he failed to heed the instruction in the note of 12 February when, in May 2009, he "sought and selected" a candidate for reception and threatened to do so again in his e-mail of 4 June 2009. He also failed to heed the instruction implicit in the note of 12 February and explicit in the performance evaluation note that he not send out e-mails containing negative comments about staff when he forwarded the e-mails of 27 May and 4 June 2009. Further, the language and tone of those e-mails were inappropriate. And although the complainant advances an argument that certain comments did not refer to the Senior Human Resources Officer, the e-mails were insulting, highly offensive and inconsistent with the duty of an international civil servant to respect the dignity of other staff members. Those actions constitute "improper action by a staff member in the performance of his duties" and, thus, amount to misconduct, as defined in Staff Regulation 44. However, in

view of the limited circulation of the e-mails and the absence of evidence that anyone was harmed, the Tribunal stops short of holding that the conduct in question constituted "serious misconduct".

19. Before turning to the complainant's other arguments, it is convenient to consider the Association's submission that, as the Advisory Board gave the complainant a proper hearing, "[d]ue process has […] been respected". The Tribunal may decline to set aside an initial decision involving a breach of due process if the breach is remedied in subsequent proceedings. It will only do so if the staff member has had a proper opportunity in those subsequent proceedings to answer the case against him by testing all the evidence and by presenting further evidence and argument. The complainant had that opportunity before the Advisory Board. Given that and given, also, that the basic facts were never in dispute, the failure to accord due process at the time of the complainant's dismissal in the respects referred to in consideration 13 does not warrant an order setting aside the decision of 5 June 2009. However, the complainant is entitled to moral damages with respect to the matters identified in consideration 13.

20. Although the conduct identified in consideration 18 constitutes misconduct, the complainant raises three other arguments that must be considered. The first is that the decision to terminate his appointment was taken with "ill intent and in breach of [the] principle of good faith". The matters advanced in support of this proposition are speculative and based on the complainant's view that his actions were justified. For example, he contends that he "was repeatedly harassed" to sign the note of 12 February 2009 so that there would be "nothing less than a signed confession [the] purpose [of which] was to act as leverage to prevent [him] from further expressing opinions and blowing the whistle". It is clear from the document in question that the signature was required only for the purpose of recording that he had received the note and understood it. There is no material that would support an allegation of bad faith, ill will or other improper motive and, thus, the argument to that effect must be dismissed.

21. It is also necessary to consider the second argument, which is that the termination of the complainant's appointment breached the principle of proportionality. It was open to the Secretary-General to conclude, in the light of the events of 4 and 5 February and the express warning of 12 February 2009, that the complainant was unlikely to desist from conduct that failed to respect the dignity of other staff members and to conclude that termination was the appropriate course. In these circumstances, it cannot be said that termination was out of proportion to the conduct involved. Accordingly, this argument must also be dismissed.

22. In a third argument the complainant contends that he should have been paid a termination indemnity. In this regard, he refers to Staff Regulation 20.3 which provides:

> "No termination indemnity shall be paid to a staff member whose contract is terminated in accordance with Staff Regulation 19.1 (b) and (c)."

Paragraphs (b) and (c) of Staff Regulation 19.1 refer, respectively, to termination for misconduct and termination for unsatisfactory service. The complainant argues that the use of the word "and" in Staff Regulation 20.3 has the consequence that a termination indemnity can only be withheld if a staff member is dismissed for misconduct and for unsatisfactory service. The argument is misconceived. In context, the word "and" is to be read distributively with the consequence that no indemnity is payable on termination for misconduct and none is payable on termination for unsatisfactory service.

23. It follows that the conduct of the complainant identified in consideration 18 constituted misconduct and that it was open to the Secretary-General to terminate his employment on that account with the consequence that he was not entitled to a termination indemnity. It also follows that, contrary to his submissions, he is entitled neither to material nor moral damages on account of the termination of his appointment, nor to the payment of emoluments he would otherwise have received. Nor is he entitled to any other relief with respect to or in consequence of the termination of his appointment. Further, and as

he accepts in his rejoinder, he is not entitled to raise a claim against the Association for breach of its duty of care to other staff members. However, he is entitled to moral damages for the failure to accord due process in the respects identified in consideration 13, which the Tribunal fixes at 500 euros. He is also entitled to have any reference to "serious" misconduct and to the failure to perform duties deleted from any record of the termination of his appointment. As he succeeds in part, the complainant is entitled to costs in the amount of 500 euros.

DECISION

For the above reasons,

1. EFTA shall pay the complainant moral damages in the amount of 500 euros.
2. It shall also pay him 500 euros in costs.
3. The Secretary-General shall delete all reference to "serious" misconduct and the failure to perform duties from any record of the termination of the complainant's appointment.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 4 May 2012, 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 July 2012.

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