113th Session **Judgment No. 3142**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs S. T. against the Energy Charter Conference (ECC, hereinafter "the organisation") on 25 June 2010, the organisation's reply of 4 October, corrected on 14 October, the complainant's rejoinder of 17 December 2010 and the organisation's surrejoinder of 28 March 2011;

Considering Article II, paragraph 5, 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 a British national born in 1960. She joined the organisation on 1 February 2001 as a Secretary at grade B3 under a three-year fixed-term contract which was renewed several times. Staff Rule 10.1, which concerns duration of appointment, reads as follows:

> "As a rule, appointments to category A posts shall be for a period of not more than five years, renewable by further periods of one year. Appointments to category B and C posts shall also be for a fixed period and renewable. If the incumbent of a post is selected for reappointment, the

> renewal of his or her appointment shall not be regarded as a break in service. No action by the Secretary-General shall be construed as, or have the effect of, granting employment for an indefinite period or constituting a permanent appointment."

Staff Circular to Staff Rule 10.1 provides that:

> "Consideration of renewal of contract shall commence no later than eleven months before expiry of the appointment and shall take into account the personal, professional and family situation of the official.
>
> All decisions on renewal shall be finalised no later than six months before expiry."

The working relationship between the complainant and her supervisor, the Director of the Directorate for Energy Efficiency and Investment, deteriorated in 2008. Following a dispute with him on 17 July 2008 during a meeting, she was absent for four days on sick leave. As from 24 March 2009 she was on sick leave for several months. By a letter dated 1 July 2009 she informed the Secretary-General that the reason for her being on sick leave was the harassment she had suffered from her supervisor. She indicated that she was willing to resume work but could no longer work with her supervisor, and she therefore asked to be reassigned to another position. The Secretary-General replied on 14 July that an ad hoc board would be established to investigate her allegations.

In mid-July one of the complainant's doctors extended her sick leave until 30 August. By a letter of 27 July 2009 the Deputy Secretary-General informed the complainant that, as she had been on sick leave for more than four months, the Secretariat wished to obtain a second opinion regarding her fitness to perform her duties. To that end, he asked her to undergo a medical examination by Dr G. The complainant replied on 30 July that, although she had some reservations concerning this procedure, which was not provided for in the Staff Rules, she would contact Dr G.

The Deputy Secretary-General wrote to her again on 31 July 2009 concerning her contract, which was due to expire on 31 January 2010. Referring to the Staff Circular to Staff Rule 10.1, he stated that a decision now had to be taken on the renewal of her contract, but that, as the investigation into her allegations of harassment was still

pending and the Administration had not yet received the second medical opinion it had requested, it was not appropriate to take a definitive decision at that time. He therefore offered her a one-month extension, until 28 February 2010. In a letter of 6 August 2009, he clarified that the second medical opinion was being requested, not only because the Administration was concerned about her health, but also because under Staff Rule 22.6(b), when an official has been on sick leave for more than four months, termination of contract may be envisaged, or sick leave on half emoluments for up to six months may be granted.

In the meantime, by a letter of 4 August 2009 from the Deputy Secretary-General, the complainant was asked to sign an appended copy of the Terms of Reference which had been established for the ad hoc board. As the organisation did not, at that time, have any procedures for dealing with harassment allegations, the Terms of Reference included a definition of harassment for the purpose of the board's investigation into the complainant's claims.

The complainant's legal adviser informed the organisation by letter of 14 August 2009 that the complainant could not accept the proposed one-month extension of her contract, which, in her view, did not comply with the provisions of the Staff Circular to Staff Rule 10.1. Citing Staff Rule 10.1, she asserted that the complainant's contract ought to have been extended for another three-year term. Having received no reply, the complainant's legal adviser wrote again on 27 August. She pointed out that the complainant was shortly due to return to work and asked to be informed of the Administration's intentions in this respect.

In an e-mail of 31 August the complainant requested a meeting with the Secretary-General in order to determine where she was to work. Having received no reply, she returned to work on 1 September 2009 and, in the absence of the Secretary-General, she met with the General Counsel, who informed her that a written response to her e-mail was in preparation. A letter was indeed issued that day by the General Counsel who, acting on behalf of the Secretary-General, notified her that, in accordance with Staff Rule 22.7(a) and pending

receipt of the second medical opinion, she should remain on sick leave in the interest of her health.

The ad hoc board issued its report on 19 November 2009. It noted that the complainant had not pursued her allegations of sexual harassment and that it had not been established that psychological harassment had occurred. However, it observed that there had been some difficulties between the complainant and her supervisor and that neither of them had managed these difficulties perfectly. It therefore held that it would now be difficult for them to work together.

By a letter of 8 December the Secretary-General informed the complainant that he had received the ad hoc board's report and could only conclude that no harassment was established. He nevertheless observed that both she and her supervisor were responsible for the problematic working situation, and that it would be difficult for them to work together again. He indicated that appropriate measures would be taken against her supervisor for his deplorable conduct, but that action might also be taken against her, as it was a serious matter to accuse wrongly another official of harassment. That same day, by a second letter, the Secretary-General notified her that, on the basis of the second medical opinion he had received, he considered that she was now fit to perform her duties. He was therefore examining her request for reassignment and would inform her in due time of his decision in that respect.

By a letter of 22 December 2009 the Secretary-General informed the complainant's legal adviser that the complainant's contract would not be renewed beyond 31 January 2010. He stated that the relevant procedural requirements had been observed as far as possible, since the issue of renewal had been examined in March 2009, even though no final decision had been taken by 31 July "out of respect for [her] circumstances". Referring to the findings of the ad hoc board, the Secretary-General recalled that both the complainant and her supervisor considered that they could no longer work together. He reiterated that he "t[ook] very seriously a situation where one official accuses another of harassment and this is subsequently found not to

have occurred", and he commented that, in hindsight, it seemed questionable whether her long period of sick leave was in fact due to sexual and psychological harassment. Nevertheless, he had enquired into the possibility of reassigning her, but no suitable position had been found.

On 29 December 2009 the complainant requested the Secretary-General to review his decision. Having received no reply, on 8 January 2010 she filed a request for advice with the Advisory Board. On 27 January the Secretary-General wrote to the chairperson of the Board contending that this request was irreceivable. He explained that he had not received her request for review until 8 January 2010, due to the organisation's closing for the Christmas holidays. Hence, the complainant had not complied with Staff Rule 25.2(b), which provides that a request to the Advisory Board may be submitted not earlier than ten days following receipt by the Secretary-General of a request for modification or withdrawal of the disputed decision. The complainant was informed on 9 February 2010 of the Board's decision to reject her request for advice as premature and consequently procedurally flawed.

In a further request for advice filed with the Advisory Board on 18 February 2010, the complainant alleged that the decision of 22 December 2009 not to renew her contract had been taken in breach of the Staff Circular to Staff Rule 10.1, as it had not been finalised at least six months before the contract's expiry date. She also alleged a violation of Staff Rule 10.1, as her contract had not been renewed for three years as was normally the case for appointments to category B.

By a letter of 16 March 2010 the chairperson of the Advisory Board informed the Secretary-General of the Board's view that, since the complainant had refused the offer of a one-month extension made on 31 July 2009, her contract had ended on 31 January 2010 and there was no obligation for the organisation to renew it. The contested decision had been taken in accordance with the applicable rules and there was no reason to modify or withdraw it. By a letter of 31 March 2010, which is the impugned decision, the Secretary-General informed the complainant that on the basis of the Advisory Board's advice he had decided to maintain his decision of 22 December 2009.

B. The complainant contends that the decision not to renew her contract was taken in breach of the Staff Circular to Staff Rule 10.1. Indeed it was taken on 22 December 2009, that is to say one month prior to the expiry date of her contract instead of the required six months. According to her, the proposal made on 31 July 2009 to renew her contract for one month was a temporary decision. She adds that it was unrealistic for the organisation to believe that, by then, the investigation into her allegations of harassment would be finalised and the second medical opinion received. She points out that it was indicated in the decision of 31 July 2009 that the organisation was "now" considering the question of renewal of her contract beyond 31 January 2010, whereas according to the Staff Circular consideration of renewal should commence no later than 11 months before expiry of the appointment. She also submits that she was entitled to have her contract renewed for three years given that Staff Rule 10.1 provides that "as a rule" appointment to category B and C shall be for a fixed period and renewable.

The complainant alleges that the non-renewal decision is tainted with misuse of authority and bias, given that there was no valid reason for not renewing her contract. Funds were available, the position had not been abolished and her performance was satisfactory. In her view, the contested decision was taken in retaliation for her having filed a harassment claim and she draws attention to the Tribunal's case law according to which a victim of harassment should not be victimised on that account.

She also alleges breach of the principle of equal treatment insofar as the organisation renewed her supervisor's contract on 15 July 2009 although the investigation into her harassment claim had not yet been finalised. This occurred despite the fact that the Secretary-General partly acknowledged her claim, which is illustrated by his statement of 8 December 2009 that he would take appropriate measures against her supervisor, whose behaviour had not been irreproachable. Lastly, she contends that the organisation has not established that her reassignment was not possible.

The complainant asks the Tribunal to set aside the impugned decision, to order that her contract be renewed for a period of three years, or at least one year. She seeks compensation for material injury in an amount equivalent to the emoluments and allowances she would have received had her contract been renewed from 1 February 2010 to 31 January 2013, plus interest at the rate of 8 per cent per annum. She also claims 20,000 euros in moral damages, and costs.

C. The organisation submits that it fully complied with the Staff Circular to Staff Rule 10.1. The renewal process began in late 2008, that is to say more than 11 months before the complainant's contract was due to expire on 31 January 2010. On the basis of that expiry date, the organisation was required by the Staff Circular to Staff Rule 10.1 to make a decision by 31 July 2009 on the renewal, which it did by offering the complainant a one-month extension of her contract. It explains that on 31 July 2009 the organisation took the only decision that could have been taken in the circumstances, as it was required by the Staff Circular to Staff Rule 10.1 to take into account the personal, professional and family situation of the complainant in deciding whether or not to renew her contract. In its view, it was in the complainant's interest that her health status and her allegations of harassment should be seriously investigated.

The defendant denies any misuse of authority. It contests the complainant's interpretation of Staff Rule 10.1 and submits that the use of the term "as a rule" does not mean that an official has an absolute right to renewal of his or her contract. According to the organisation, as the complainant refused the one-month extension of her contract, no further decision was called for by the Secretary-General. It adds that no specific duration is foreseen in the applicable rules concerning the contract of a category B official. In any event, due to the political and financial uncertainty surrounding the Energy Charter process, the Secretary-General has limited all contract renewals to a maximum of one year as from March 2009.

The organisation asserts that the proposal made in the letter of 31 July 2009 to renew the complainant's contract for one month

beyond its date of expiry of 31 January 2010 was in the complainant's interest. It points out that the complainant had been on sick leave from 24 March 2009 to 30 August 2009, certified by her own practitioners, that is to say for more than four months, which is the maximum period of continuous sick leave on full pay allowed under Staff Rule 22.6(b); hence, the organisation would have been entitled to terminate her contract on 31 July 2009 or even earlier. It also asserts that the contract of the complainant's supervisor was renewed in accordance with applicable rules and that the circumstances of the complainant's renewal of contract and that of her supervisor were different. It therefore rejects the allegation of unequal treatment.

D. In her rejoinder the complainant reiterates her arguments. She contends that the offer made in the letter of 31 July 2009 for a one-month extension of her contract was not a decision but a mere proposal.

E. In its surrejoinder the organisation maintains its position. It asserts that the letter of 31 July 2009 constituted a decision and points out that there was an express reference therein to the Staff Circular to Staff Rule 10.1, which concerns renewal of a contract.

CONSIDERATIONS

1. This complaint is directed to a decision of the Secretary-General of 31 March 2010 by which, in accordance with the advice of the Advisory Board, he "maintain[ed his] decision of 22 December 2009 not to renew [the complainant's] contract, which came to an end on 31 January 2010". The decision of 22 December involved events beginning, at the latest, when the complainant proceeded on sick leave in March 2009. On 1 July 2009 she wrote to the Secretary-General stating that her sick leave was the "result of an untenable harassment situation from [her] immediate supervisor". In the same letter, she categorised the harassment as "sexual and psychological" and asked if it was possible to be reassigned as "it would not be possible for [her] to work for [her supervisor] anymore". The Secretary-General replied on 14 July 2009, expressing his surprise that "so serious an allegation

was not put forward [...] several weeks ago", requesting a "detailed and substantiated written justification of [her] harassment allegation" and informing her that an ad hoc board would be established to investigate and advise him whether her allegation was substantiated. The Secretary-General stated in the same letter that:

> "[...] on the basis of the report provided [...] by the *ad hoc* board [...] I will take a final decision with respect both to your request to be reassigned [...] and to the renewal or non-renewal of your employment contract."

The complainant provided written details of her claim of harassment on 25 July 2009. It will later be necessary to refer to those details. In the meantime, however, it is convenient to explain the Secretary-General's reference to the taking of a final decision with respect to the renewal of the complainant's contract.

2. As already indicated, the complainant's contract was due to expire on 31 January 2010. The Staff Circular to Staff Rule 10.1 provides:

> "Consideration of renewal of contract shall commence no later than eleven months before expiry of the appointment and shall take into account the personal, professional and family situation of the official.
>
> All decisions on renewal shall be finalised no later than six months before expiry."

It would appear that a decision on the renewal of the complainant's contract was initially held in abeyance by reason of her sick leave. On 27 July 2009 the Deputy Secretary-General wrote to the complainant, noting that she had been on sick leave for more than four months and advising that it had been decided to request a second medical opinion as to her fitness to return to work. The reference to "more than four months" sick leave relates to Staff Rule 22.6(b) which permits of termination of employment if an official has been on sick leave for a continuous period of more than four months. On 30 July the complainant replied, expressing her surprise at the request for a second opinion as she had informed the Secretariat on 1 July and, again, on 24 July 2009 that she "would be ready to go back to work but under the supervision of someone [else]". On 31 July the Deputy Secretary-General again wrote to the complainant, stating that, as her

allegation of harassment was being investigated and the Secretariat was awaiting a second medical opinion, it was not considered "appropriate to take a definitive decision regarding [her] employment contract". He stated in that letter that "[t]he Secretariat therefore propose[d] [an] extension of [her] contract [...] by one month" and sought her consent to that extension. The complainant's legal adviser replied on 14 August 2009 indicating that, in view of the terms of the Staff Circular to Staff Rule 10.1, the complainant could not consent to that course. The legal adviser also asked for information as to the complainant's reassignment.

3. As the complainant had not received an answer to her request for reassignment on 31 July 2009, when her sick leave was due to expire, one of her doctors extended her sick leave until the end of August. She reported for work on 1 September 2009 but was then required to take further sick leave pursuant to Staff Rule 22.7(a) pending receipt of a second medical opinion. For various reasons, that opinion was not provided until 25 November and not received by the Secretary-General until 30 November 2009. That opinion was to the effect that the complainant had been fit to return to work since the date of her examination, namely 27 October 2009.

4. The ad hoc board established to investigate the complainant's claim of harassment submitted its report on 19 November 2009. The Staff Rules and Staff Regulations contain no definition of "harassment" and make no provision for investigation of such claims. Thus, it was necessary for the complainant and her supervisor to accept Terms of Reference that were, apparently, drafted within the Secretariat. The Terms of Reference defined "harassment" as:

> "any improper behaviour by a staff member that is directed at, and is offensive to, another individual and which that staff member knew or ought reasonably to have known would be unwelcome. It comprises objectionable conduct or comment made on either a one-time or continuous basis that demeans, belittles, or causes personal humiliation or embarrassment to an individual."

The Terms of Reference made no specific provision with respect to sexual harassment.

5. The complainant's allegation of harassment included claims that:

- although smoking was not allowed, her supervisor smoked cigars in the office and in her presence;
- he often required her to work at his computer, rather than at her own desk, with him sitting close by and "on two occasions [he] put his arms on either side of [her] whilst manipulating the mouse of his computer";
- although she was employed as the secretary of the Directorate for Energy Efficiency and Investment, her supervisor disapproved of her working at reception or relieving other secretaries;
- he made remarks to her, some of them complimentary, with respect to her clothes, her weight and personal appearance;
- he made comments to others criticising her work and her intelligence and, on one occasion, suggested that there might be a problem with her sex life;
- on 17 July 2008 there was an incident during which her supervisor lost his temper and, following which, the complainant took sick leave for one week;
- following the incident on 17 July 2008, her supervisor denied her access to the C drive on his computer, gave her incorrect versions of documents and blamed her when the incorrect versions were distributed;
- on one occasion, her supervisor insulted other staff members and when she asked if she could leave the office, he shouted at her telling her that she was forbidden to do so and that she had to do as he said.

6. The ad hoc board interviewed the complainant and her supervisor and "met a number of relevant witnesses, under the condition of strict confidentiality". So far as is presently relevant, it appears that the supervisor stated that the complainant did not make "any reprimands regarding working in his office on his computer" and

did not express any objection to him with respect to her workload or his cigar smoking. He also denied making remarks to the complainant of a sexual or suggestive nature. However, it seems that he accepted that he made some questionable remarks as the board found that the complainant had made no objection "to the remarks she might have considered inappropriate".

7. So far as concerns the incident of 17 July 2008, the ad hoc board found that the supervisor's "emotions were very high, and unfortunately the complainant's reaction had only aggravated the situation" and, also, that there was a lack of self-control on both sides. The board noted that, after this incident, the supervisor asked to have the complainant reassigned within the Secretariat, a request that was repeated in April 2009 when she was absent on sick leave. The board also found that, after the incident of 17 July 2008, relations between the complainant and her supervisor "became unsatisfactory and neither side made a substantial effort to manage the relations in order to reduce the psychological tension and improve professional performance".

8. The ad hoc board also found that the complainant was a "person who is capable of speaking her mind on difficult issues or standing up for her position even in a conversation with superiors", adding that according to the witnesses this had "happened a number of times vis-a-vis [her supervisor]". The ad hoc board also stated that "[d]uring the interview with [the complainant it] came to a conclusion that she was withdrawing her claims of sexual harassment". In this regard, it stated that she had specifically said that she had "never suggested sexual harassment" but that there were "sexual innuendos" that aggravated the situation. Moreover, the board acknowledged that, in her comments on its draft report, the complainant had denied withdrawing allegations, as distinct from working within the definition of "harassment" in the Terms of Reference.

9. Without making findings as to the conduct involved, the ad hoc board concluded that there "ha[d] been behaviour by [the supervisor] directed at [the complainant]" and that some of it "was

offensive to [her]". It proceeded to "assume […] some of the behaviour was improper" but found that her claim of harassment was not established because it could not "confirm that [the supervisor] knew, or ought to have known, that his behaviour [...] would be unwelcome". In so doing, it noted that the complainant was capable of defending herself, that she had not tried to resolve her difficulties with her supervisor and that, even when she asked for a note to be placed on her personal file with respect to the incident of 17 July 2008, she asked that it not be shown to or discussed with him. The report concluded with the statement:

> "[the complainant] made two grave claims of harassment against [her supervisor]. One she did not pursue and the other is not established. This created a situation where it would now be difficult for the two to work together. [The complainant] could have avoided such situation by making [an] earlier attempt to resolve difficulties [...] in a less confrontational manner, rather than saying nothing until 1 July 2009."

10. As the complainant does not directly challenge the findings of the ad hoc board, it is unnecessary to say more than that, in the absence of findings as to the specific conduct involved, a finding that a supervisor neither "knew [n]or ought to have known" that his conduct was unwelcome, even though that conduct is "assumed" to be improper and was directed to a subordinate who found it unwelcome, raises more questions than it answers. More particularly is that so as the test is not whether a person ought to have known, as stated by the board, but whether he "ought reasonably to have known" – a test that requires an objective evaluation of the conduct involved. However, it must be noted that the board did not find that the complainant made false allegations. Indeed and although it did not find that her claims were true, it did not find that any of them were false. And subject only to the question whether her supervisor knew or ought reasonably to have known that his conduct was unwelcome, his alleged statements as to the complainant's clothing and appearance were capable of being categorised as sexual harassment.

11. As earlier indicated, the Secretary-General stated, as early as 14 July 2009, that "[o]n the basis of the report provided [...] by the

ad hoc board [he would] take a final decision with respect [...] to the renewal or non-renewal of [the complainant's] employment contract". On 8 December 2009 he wrote to the complainant's legal adviser, noting that the conduct of the complainant's supervisor had "not been irreproachable" and that he deplored it but, also, stating that the complainant had "wrongly accused" her supervisor of "sexual harassment" and that that was "a serious allegation which [she] apparently sought to withdraw at a later stage". He added that the "accusation of sexual harassment ha[d] contributed to a situation where it would be difficult for [the complainant] and [her supervisor] to work together in the future". He also stated that he took seriously "a situation where one official accuses another of harassment and this is subsequently found not to have occurred, whether by a finding to that effect or a withdrawal of the claim". He concluded by saying that he "reserve[d] the right to take appropriate actions in this regard against [the complainant] in the near future".

12. On 22 December 2009 the Secretary-General wrote to the complainant's legal adviser informing her that he had decided not to renew the complainant's contract. He stated in that letter that "[her] allegations of harassment […] ha[d] not been substantiated" and that it would not be feasible for her to return to her former post. He added that the complainant "ha[d] largely contributed to this situation by wrongly accusing [her supervisor] of sexual harassment". He also repeated his earlier statement that he took seriously "a situation where one official accuses another of harassment and this is subsequently found not to have occurred, whether by a finding to that effect or a withdrawal of the claim". He concluded by saying that, nonetheless, he had made enquiries as to the complainant's reassignment but had reached the conclusion that this was not feasible.

13. At this stage it is convenient to note an argument made by the defendant that the decision of 22 December 2009 is "inextricably linked to the [...] earlier 31 July 2009 decision to offer the [c]omplainant a one-month extension of her contract". According to the argument, the complainant's refusal to accept the one-month extension had

the consequence that her contract expired according to its terms on 31 January 2010 and the letter of 22 December 2009 merely confirmed the situation that came about as a result of that refusal. It was on this basis that the Advisory Board advised the Secretary-General that there was no reason to withdraw or modify his decision of 22 December 2009. The argument must be rejected. There was no decision to extend the complainant's contract by one month, only a proposal to do so. And that proposal was subject to the complainant's consent. Moreover, in a context in which the Secretary-General had stated that he would make a final decision when he had received the report of the ad hoc board and the Deputy Secretary-General had said that it was not appropriate to take a "definitive" decision, the proposal could only be construed as an interim measure which conflicted with the terms of the Staff Circular to Staff Rule 10.1 and was thus not a course to which the complainant could consent. As the Secretary-General's decision of 31 March 2010 was based on the erroneous view of the Advisory Board with respect to the legal effect of the proposal of 31 July 2009, that decision must be set aside.

14. The complainant makes various arguments with respect to the decision of 22 December 2009, including that it was taken for an improper purpose. Several "real" reasons are suggested. However, it is clear that the reason for the decision was the report of the ad hoc board, as the Secretary-General said it would be on 14 July 2009. The question is whether that was a valid reason. Although it may be that the Secretary-General anticipated that he might have a difficult situation on his hands, particularly as the complainant's supervisor had again requested her reassignment in April 2009, it was not permissible to link the renewal of her contract to the outcome of the ad hoc board's investigation. That was contrary to the requirement of the Staff Circular to Staff Rule 10.1 which the Secretary-General was obliged to implement. Moreover and more significantly, the organisation had a duty to investigate the complainant's claim of harassment independently of any question as to the renewal of her contract. Indeed, to make a staff member's contract renewal dependent on the outcome of an investigation of his or her claim of harassment is a

clear disincentive to the making of a claim, even if the claim is justified.

15. Quite apart from the wrongful linking of the renewal of the complainant's contract to the outcome of her complaint of harassment, the report of the ad hoc board did not justify the course taken. There is nothing to suggest that the complainant withdrew any of the specific claims made by her on 25 July 2009 and, as already noted, some of those claims were capable of being categorised as sexual harassment. Moreover, the board did not find that any of the claims were false. Further, although the board stated that it had come to the conclusion in its interview with the complainant that she "was withdrawing her claims of sexual harassment", its ultimate conclusion was that "she did not pursue" these claims, a course which is entirely explicable in view of the absence of any reference to "sexual harassment" in the Terms of Reference. So far as concerns the claim of harassment generally, the Secretary-General committed an error of law in treating the situation as "serious" on the basis that there had been a finding that harassment had not occurred. It is entirely proper to treat as serious a situation where it is subsequently found that an allegation of harassment has no factual basis. In that situation, there has been a false accusation. In the present case, the ad hoc board found that there was a factual basis to the complainant's claim, albeit without identifying the precise conduct involved. It found that there had been no harassment solely on the basis that the complainant's supervisor neither knew nor ought to have known that his conduct – conduct that the Secretary-General said that he deplored – was unwelcome. And it did so simply on the basis that she had not told him so. Where behaviour is such as to satisfy all the elements in the definition of "harassment", save knowledge on the part of the perpetrator, it is entirely proper for a staff member to make a claim of harassment. And a decision not to renew that staff member's contract on the ground that a complaint of harassment, although properly made, was not sustained because the perpetrator neither knew nor ought reasonably to have known his conduct was unwelcome gives rise to an inference of retaliation. More particularly is that so where, as here, the contract

of the person who engaged in the conduct concerned was renewed quite independently of the outcome of the investigation and the only real criticism that could be made of the person whose contract was not renewed was that she did not make her feelings known and did not make an "earlier attempt to resolve difficulties [...] in a less confrontational manner".

16. The decision of 22 December 2009 must be set aside. The complainant contends that her contract should have been renewed for three years, as had been done previously, and claims material damages on that basis. However, the material in the file indicates that, since March 2009, contracts have only been renewed for one year because of political and economic uncertainty. In these circumstances, the complainant is entitled to be paid her full salary and emoluments from 1 February 2010 to 31 January 2011, together with interest at 5 per cent per annum from due dates until the date of payment. The complainant must give credit for any earnings by her in that period. She is also entitled to moral damages in the amount of 20,000 euros and costs in the amount of 8,000 euros.

DECISION

For the above reasons,

1. The decision of the Secretary-General of 31 March 2010 is set aside as is his earlier decision of 22 December 2009.
2. The ECC shall pay the complainant the salary and emoluments she would otherwise have received from 1 February 2010 to 31 January 2011, together with interest at the rate of 5 per cent per annum from due dates until the date of payment. The complainant must give credit for earnings by her in that period.
3. The ECC shall pay the complainant moral damages in the amount of 20,000 euros.
4. It shall also pay her costs in the amount of 8,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 9 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