

The Administrative Tribunal,

Considering the complaint filed by Miss Yolanda Margaretha Elisabeth Spaans against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 30 October 2000 and corrected on 7 December 2000, the OPCW's reply of 16 January 2001, the complainant's rejoinder of 26 March and the Organisation's surrejoinder of 4 July 2001;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant was born in 1966 and is of Dutch nationality. She was employed by the Preparatory Commission for the OPCW from May 1994 as a travel clerk at grade GS-4. Her appointment was renewed several times up to 23 May 1997 when the Preparatory Commission ceased to exist and its functions were transferred to the OPCW. From 24 May the Organisation appointed the complainant as a travel clerk on a three-year contract and from 25 June 1997 it appointed her as a travel assistant in the General Services Branch on a three-year contract at grade GS-6. During a restructuring process in 1998 the branch was renamed the Procurement and Support Services Branch (PSB) and her title became Support Services Assistant.

From October to December 1998 the complainant was on sick leave. She resumed work in January 1999, working part-time for several weeks. In July the Organisation transferred her with her GS-6 post to the International Cooperation and Assistance Division. She continued to perform some of her previous duties. Subsequent to a recommendation of the Contract Renewal Board, the Director-General informed the complainant on 6 October that he had decided not to offer her a further contract when her existing one expired in June 2000, as in view of the restructuring of the Procurement and Support Services Branch he intended abolishing the post of Support Services Assistant.

The complainant wrote to the Director-General on 2 December 1999 requesting a review of that decision. She noted that the Director-General had not yet decided to abolish her post, but that it was however his "intention" to do so. By a letter dated 14 December the Director-General maintained his decision. She appealed against it on 13 January 2000.

The Appeals Council reported on 27 July 2000. The panel found that her right to due process had been violated and recommended reinstating her in her post. In the event of her post having effectively been abolished and no other suitable ones being available, it recommended that she be paid compensation equal to twelve months' net base salary and that she be considered for future vacancies for which she is qualified. In a dissenting opinion accompanying the report a member of the panel recommended that the complainant be paid twenty-four months' net base salary. The Director-General did not concur with the Council's conclusions or its recommendations. He informed the complainant of this in a letter of 3 August 2000. That is the decision she impugns.

B. The complainant submits that, according to the case law of the Tribunal, the Organisation does not have total freedom with regard to non-renewal of a fixed-term contract: its discretionary power is limited and the administrative decision it takes is subject to review by the Tribunal. She claims that the reasons for not renewing a contract should be given in the notice of non-renewal and may not be added to later. The only reason given in the Director-General's letter of 6 October 1999 was his alleged intention to abolish her position, but a mere intention to abolish a post does not justify a non-renewal of contract. Moreover, the burden of proof lies with the Organisation: it has to show that the complainant's post was in fact abolished. She argues that a new staff member, Ms V.,

recruited externally, was put on her post. The official in question was appointed as a "Senior Support Services Clerk" on 28 September 1999 at GS-5 level and was promoted to level GS-6 as "Support Services Assistant" on 26 July 2000, one month after her own employment ceased. Her post was not therefore abolished. It continued to exist in the same branch.

The complainant alleges that the real reason for non-renewal was prejudice against her on the part of officials of the Organisation, probably on account of her illness, which in her opinion was attributable to the immense workload she faced. Despite the length of notice she was given the Organisation took no steps to find her alternative employment. Furthermore, she could legitimately expect that her contract would be renewed. A new travel agency took over at OPCW in 2000: the new staff members required supervision, training and assistance and the OPCW could ill afford to lose such a crucial post as hers.

The complainant seeks (1) the quashing of the impugned decision; (2) payment, with compound interest, of all remuneration and benefits that she would have been entitled to from 25 June 2000 up to the date of this judgment; (3) the renewal of her contract and retroactive reinstatement in her post or another suitable one or, alternatively, an award of damages equal to the remuneration she would have received if her appointment had been renewed for a three-year period from 25 June 2000; (4) the "repair" of any material damage and reimbursement, with compound interest, of expenses caused by the non-renewal; (5) moral damages; and (6) costs.

C. In its reply the Organisation argues that the complaint is devoid of merit. It affirms that the Director-General's stated intention to abolish the post was carried out. Abolition of posts in the interest of the Organisation lies within the Director-General's discretionary power. The case law establishes that a decision to abolish a post may be impugned under certain conditions, none of which are present in this case. After the complainant's transfer in 1999 her original duties were divided among the staff of four branches and following the expiration of her contract in 2000 there was a second dividing up of her functions.

It states that the allegation of personal prejudice is unfounded. The abolition of her post was in the interest of the Organisation. In discussing the complainant's case, the Contract Renewal Board concluded that the post necessitated "skills and knowledge" other than those possessed by the complainant. Nothing in the Staff Regulations obliges the OPCW to find alternative employment for staff whose contracts are not being renewed. That is why the complainant was given more than eight months' notice. In spite of that she has not sought alternative employment with the Organisation.

Her claim that she had a legitimate expectation of renewal is also unfounded: her latest letter of appointment expressly stipulated that her contract did not carry "any expectancy for extension or conversion". Moreover, she has not proved that she suffered moral injury. Legally, the Organisation could have ended her appointment upon abolition of her post, but it kept her on for the remainder of her contract.

D. In her rejoinder the complainant presses her claims for redress. Even though the complainant's previous tasks were distributed among existing staff members and the new member of staff referred to above, it is clear that the latter took over the grade and title of her post. Contrary to the requirements advocated in the case law, the assignment of her functions to other people did not result in a reduction of the number of staff, or in a reduction of costs for the Organisation. There was prejudice against her and the OPCW was simply trying to "get rid" of her.

She notes that the Contract Renewal Board was chaired by the Director-General and that its recommendation on her case does not mention abolition of post or restructuring of the Procurement and Support Services Branch, which were the reasons for non-renewal given in the letter of 6 October 1999. Furthermore, according to the case law it is the organisation's duty to find alternative employment for the staff member.

E. In its surrejoinder the Organisation takes the view that the abolition of the complainant's post was legitimate and that no single staff member is now performing the tasks she was previously carrying out. Reduction of costs was a requirement in the Tribunal cases cited by the complainant in her rejoinder, but is not a general requirement applicable in all cases of abolition of post, and is not material in this case.

All contract renewals are subject to the Contract Renewal Board's recommendation. The fact that the Director-General chairs it does not taint its recommendation. That function has on almost all occasions been delegated to his deputy. It points out that renewals too are within the discretion of the Organisation and that her post was in fact abolished upon her transfer to the unbudgeted post in the International Cooperation and Assistance Division in July

1999. It denies that there was any prejudice against her.

CONSIDERATIONS

1. The complainant was employed by the Preparatory Commission for the OPCW from May 1994 on a fixed-term appointment, as a travel clerk, at grade GS-4. Her contract was renewed several times. In May 1997, following the creation of the OPCW, she was granted a three-year appointment. On 25 June 1997 she was promoted to grade GS-6 as a travel assistant on a three-year contract that superseded the previous one. In a restructuring process in 1998 the branch she worked in became the Procurement and Support Services Branch (PSB/ADM) and her title changed to Support Services Assistant. By oral instructions from the Human Resources Branch, she was transferred to the International Cooperation and Assistance Division on 12 July 1999.

By a letter dated 6 October 1999, the Director-General informed the complainant that her contract would not be renewed when it expired on 24 June 2000, because it was his "intention to abolish the position of Support Services Assistant in view of the restructuring of the Procurement and Support Services Branch". In a letter of 2 December 1999 to the Director-General the complainant requested review of that decision, but on 14 December 1999 the Director-General informed her that he had not found any basis for reconsidering his decision. The complainant was successful before the Appeals Council which recommended her reinstatement in a report dated 27 July 2000, but the Director-General did not accept its recommendation and by a letter dated 3 August 2000 confirmed his initial decision. That is the impugned decision.

2. It is elementary that where a reason is given for taking a decision which is adverse to the interests of a staff member the organisation is held to that reason and cannot later seek to justify its action on other grounds. Thus, the Tribunal will give no effect to the pleas of the Organisation that the complainant's contract was not renewed because her performance had been less than superlative. The Organisation must show that the reason given, the Director-General's intention to abolish her post in view of restructuring, was a true and valid reason for the non-renewal of her contract.

3. The Organisation attempts to do this by arguing that the complainant's post was in fact abolished at the time she was transferred to the International Cooperation and Assistance Division. That cannot be right. That transfer took place in July 1999 and if it had involved the abolition of the complainant's post at that time the Director-General would not have spoken of a mere intention to abolish her post in a letter written almost three months later.

4. The complainant says that in fact her post was never abolished and that the evidence bears this out. After she was transferred she continued to perform a number of the duties which had previously been hers in the Procurement and Support Services Branch. Some of those functions remained in the Branch and were performed by Ms V. who had been recruited from outside the Organisation on 28 September 1999 and started as a "Senior Support Services Clerk" at grade GS-5. Other duties previously performed by the complainant were temporarily distributed to staff of other departments but most were absorbed back into the Branch in June 2000 after the complainant had left the Organisation.

5. Furthermore, as from 26 July 2000, only one month after the complainant had been released from service, Ms V. was promoted to grade GS-6 as "Support Services Assistant". This is exactly the same title as the complainant had held, with the same grade and responsibilities and in the same branch. Besides which, the majority of the duties which had been performed by the complainant while she had been in the Procurement and Support Services Branch were assigned back to that department. The inference is irresistible that the complainant's post was never abolished but was simply given to another recently recruited staff member. Indeed, in an e-mail of 3 May 2000 the Director-General's Chief of Cabinet said his understanding was that "when [the complainant] goes her post ... would remain in PSB".

6. In other words, the complainant's post was and had always remained in PSB. This was the post to which Ms V. was appointed after the complainant had left. Since that post was never abolished it follows that either the Director-General never really had the intention to abolish it, or, if he did, he changed that intention at some time between the date on which he advised the complainant in October 1999 of his "intention" to abolish it and the date, in July 2000 - prior to the impugned decision - on which he appointed Ms V. to that post.

What is more, the Contract Renewal Board, upon whose advice the Organisation says the Director-General relied in deciding to abolish the complainant's post, far from recommending its abolition, instead suggested that someone with different qualifications should be appointed to it in these terms:

"In order to better serve the needs of the Organisation and to fully meet the requirements for this post in the future, skills and knowledge other than those possessed by the incumbent are needed. Renewal of the contract should therefore not be offered."

7. One of the tests which the Tribunal has developed over the years to determine whether or not a post has truly been abolished is to ask whether or not the "abolition" has resulted in a reduction of the number of staff in the affected department. (See, for example, Judgment 139, *in re* Chuinard.) If it has not, the presumption is that all that has taken place is a redistribution of functions among existing posts, a normal incident of good management, and not the abolition of one or more posts, a much more serious matter which will usually result in the loss of employment for one or more staff members. Although the complainant argues that the restructuring led to an increased number of staff members the Organisation in its surrejoinder states that:

"While the functions [in the travel section] have been distributed among a greater number of staff involving other branches, PSB/ADM has retained the same number of budgeted posts."

8. Since the reason given by the Director-General for the decision not to renew the complainant's contract was not true, the impugned decision is based on an obvious mistake of fact; it cannot stand and must be set aside.

9. Before turning to the matter of remedy the Tribunal adds that, although the point was not taken in argument, it has some doubt as to even the formal validity of the impugned decision. The text of the Director-General's decision read as follows:

"On 27 July 2000, I received the report of the Appeals Council panel set up to hear your appeal against my decision not to renew your contract.

I am attaching a copy of the Appeals Council's report.

I do not agree with the Appeals Council's reasoning and conclusion. I therefore do not accept its recommendation.

Consequently, having considered all aspects of the report, and taking into account all the surrounding circumstances, I find no grounds for reconsidering my decision not to renew your contract."

10. When the executive head of an organisation accepts and adopts the recommendations of an internal appeal body he is under no obligation to give any further reasons than those given by the appeal body itself. Where, however, as in this case, he rejects those recommendations his duty to give reasons is not fulfilled by simply saying that he does not agree with the appeal body. As the decision must be set aside on other grounds it is not necessary to go any further into the matter, just as it is not necessary to take up any of the complainant's other pleas.

11. The Appeals Council states in paragraph 24 of its report that on the basis of the practice being established at the Organisation, contractual renewals have been issued with a duration of two years, and in exceptional cases, one year.

It appears therefore that in this case, where no abolition of post in fact took place, the complainant could not have expected renewal for more than two years.

The complainant's contract expired on 24 June 2000. The Tribunal will not order reinstatement but will order instead payment equal to all remuneration (salary and allowances) and all other benefits to which the complainant would have become entitled if her contract had been renewed to 24 June 2002, subject to her accounting for any net earnings from outside employment to the date of delivery of this judgment. She is entitled to an award of 10,000 euros in damages and to 5,000 euros in costs.

For the above reasons,

1. The impugned decision is set aside.
2. The Organisation shall provide the relief set out in 11 above.
3. The Organisation shall pay the complainant 10,000 euros in damages.
4. It shall pay her 5,000 euros in costs.
5. All her other claims are dismissed.

In witness of this judgment, adopted on 12 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet