

The Administrative Tribunal,

Considering the second complaint filed by Mr R. H. D. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 21 March 2006 and corrected on 9 June, the Organisation's reply of 17 August, the complainant's rejoinder of 17 November 2006 and the OPCW's surrejoinder of 23 January 2007;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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

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

A. The complainant, a Bulgarian national born in 1947, was a staff member of the OPCW from 1 February 1997 until 31 December 2004. In September 1998 he became a participant in the Organisation's Provident Fund. Information concerning the Provident Fund and the difficulties that it faced particularly in 2000 and 2001 are to be found in Judgment 2403, delivered on 2 February 2005. Suffice it to recall that in that judgment the Tribunal held that the OPCW had failed to take adequate measures to ensure regular monitoring of the performance of the Provident Fund, and had thereby contributed directly to the capital loss which the complainant in that case had sustained on his entitlements.

At the material time, staff members separating from the Organisation could be paid their Provident Fund entitlements up to six months in advance of their separation date. The complainant chose to avail himself of this option. Thus, the balance of his Provident Fund accounts was paid to him on 7 September 2004, and that same day the Organisation sent him a statement notifying him of the amount paid.

On 6 January 2005, shortly after the complainant's separation, the Organisation made a final payment to his bank account, including his last salary and various other entitlements. By a letter of 25 February 2005 the complainant asked the Director-General to "review the administrative decision associated with the payout of [his] Provident Fund money by the OPCW, which payout became fully operative and determined as of 31 December 2004, the date of [his] separation [...]". He argued that he was in the same situation as the complainant in the case leading to Judgment 2403 and claimed compensation for the loss he had allegedly sustained on his Provident Fund entitlements.

Having received no reply to this letter, or indeed to the reminders that he sent on 1 and 13 April, the complainant lodged an appeal with the Appeals Council on 25 April 2005, challenging the implicit rejection of his request for review. That same day, however, the Head of the Human Resources Branch had written to inform him that the Director-General had decided to reject his request for review as time-barred, and hence irreceivable, on the grounds that he had been given written notification of his Provident Fund entitlements on 7 September 2004 but had failed to lodge an appeal within two months of that date, as required by Interim Staff Rule 11.2.02(a). In the ensuing proceedings before the Appeals Council, the complainant therefore withdrew his initial appeal and instead challenged the express decision contained in the letter of 25 April 2005.

The Appeals Council shared the view that, in order to contest the amount paid to him in respect of his Provident Fund entitlements, the complainant ought to have submitted a request for review within two months of receipt of the statement dated 7 September 2004. Consequently, in a report dated 28 November 2005, it recommended that the Director-General reject the appeal as irreceivable. By a letter of 15 December 2005 the Head of the Human Resources Branch informed the complainant that the Director-General had decided to follow that recommendation. That is the impugned decision.

B. The complainant points out, with regard to the receivability of his complaint, that according to an information circular issued by the OPCW on 22 November 2005, staff members claiming compensation in respect of Provident Fund losses "must be able to demonstrate an actual capital loss and that can only be done at the point of separation

from the OPCW”, which in his case occurred on 31 December 2004. He draws attention to the fact that, after his Provident Fund entitlements had been paid to him on 7 September 2004, the Organisation paid monthly Provident Fund contributions into his bank account until the time of his separation, so that the last payment that he received under that heading occurred on 6 January 2005, when his final salary was paid to him. He states that although he did not receive his final payslip until 27 May 2005, he had in the meantime received a bank statement dated 24 January showing the Organisation’s final payment of 6 January, and his request for review was submitted within two months of receipt of that bank statement.

On the merits, the complainant refers to the Tribunal’s findings in Judgment 2403 and contends that mismanagement of the Provident Fund, combined with the Organisation’s failure to take adequate measures to monitor the Fund’s performance, contributed to the capital loss that he incurred. On the basis of the difference between the value of his net contributions as shown in the statement of 7 September 2004 and the balance of his Provident Fund accounts as shown in statements dated 30 June and 29 July 2002, he evaluates that loss at approximately 5,600 euros. Referring to consideration 25 of Judgment 2403, he acknowledges that the Organisation may not be liable for the entire loss suffered by him, and he leaves it to the Tribunal to determine the extent to which the loss is attributable to the OPCW and, hence, the amount of compensation that is due.

The complainant asks the Tribunal to find his complaint receivable and to set aside the Director-General’s decision of 15 December 2005. He also claims compensation for the loss that he suffered as a result of the Organisation’s breach of its obligation to monitor the performance of the Provident Fund, with interest at an annual rate of 8 per cent, and costs.

C. In its reply the OPCW contends that the complaint is irreceivable for failure to comply with the time limits for internal appeals. It asserts that the final payment of his Provident Fund entitlements occurred on 7 September 2004 and that none of the payments made to him after that date can be considered to be part of those entitlements. Regarding the information circular to which the complainant refers, the Organisation submits that the normal scenario is that staff members are paid their Provident Fund entitlements at the time when they separate from the OPCW, hence the indication that a capital loss “can only be [demonstrated] at the point of separation from the OPCW”. It argues that this clearly does not apply to staff members who, like the complainant, request early payment of their entitlements, resulting in early separation from the Fund, that is before their separation from the Organisation.

On the merits, the Organisation states that the complainant has not proved that he suffered a loss. Nor has he substantiated his assertion that he is in the same position in fact and law as the complainant in the case leading to Judgment 2403.

It also points out that at the relevant time the rules governing the Provident Fund offered participants certain choices regarding the way in which their holdings were to be invested, and it submits that, in accordance with the Tribunal’s ruling in Judgment 2403, it should not be held responsible for losses resulting from choices made by the complainant. In this connection, it draws attention to the fact that the complainant chose to invest some of his holdings in United States dollars, whereas his contributions were made in euros. Noting that the value of the dollar fell in relation to the euro during the period at issue, it submits that it cannot be held responsible for losses resulting from currency conversions at the time when he received his entitlements.

The Organisation considers that the complainant is wrong in calculating his alleged loss solely on the basis of the period from September 1998 to July 2002. It argues that, since the value of any investment is liable to vary throughout the investment period for reasons beyond the control of the investor, the only time when it is meaningful to speak of a loss on an investment is when that investment is terminated. Thus, it is only when a staff member ceases to be a participant in the Fund and receives the payment of his or her entitlements – on 7 September 2004 in this case – that it is possible to determine whether a loss has been sustained.

Lastly, the OPCW submits that in calculating his alleged loss the complainant has not taken into account the administrative costs associated with the running of the Provident Fund. It observes that if these costs are deducted from his contributions, the possibility of his having incurred the alleged loss appears even more remote.

D. In his rejoinder the complainant maintains that his complaint is receivable. He contends that, contrary to the view put forward by the defendant, he did not separate from the Provident Fund until he separated from the OPCW. Moreover, since the Organisation continued to pay Provident Fund contributions on his behalf after 7

September 2004, albeit in a different manner, the decision of which he was notified on that date did not relate to his final Provident Fund payment. He argues that his situation in fact and law is the same, *mutatis mutandis*, as that of the complainant in the case leading to Judgment 2403.

According to the complainant, the policy of allowing participants to choose how their Provident Fund holdings were to be invested did not really materialise until August 2002. He adds that in any case some two-thirds of the Provident Fund investments were chosen by the Fund's Management Board and imposed on all staff members.

Regarding the calculation of his loss, he submits that in Judgment 2403 the Tribunal considered that it was the period during which the Organisation was in breach of its obligation to ensure effective monitoring of the Fund's performance that should be taken into account, and not the period of participation in the Fund. Furthermore, in his calculation, he did in fact deduct the administrative costs from the value of his contributions.

E. In its surrejoinder the Organisation maintains its objection to the receivability of the complaint and reiterates its arguments on the merits. It asserts that in all material respects, the complainant's situation in fact and law is different from that of the complainant in the case leading to Judgment 2403.

CONSIDERATIONS

1. The complainant was a staff member of the OPCW from 1 February 1997 until 31 December 2004. He became a participant in the OPCW Provident Fund in September 1998. During the complainant's participation, the Fund suffered various losses which were apportioned to the accounts of participants. As a result, some of them sustained a capital loss, as appears in Judgment 2403. In that case, the Tribunal held that the OPCW had failed to establish an effective system to monitor the performance of the Provident Fund and was thus liable to make good part of the capital loss sustained by the complainant in that case. The present complainant claims that he is in the same position as the complainant in Judgment 2403 and seeks compensation and interest.

2. In March 2004 the Management Board of the Provident Fund decided that separating staff members could, at their request, receive payment of their entitlements in the Fund up to six months in advance of their separation. The complainant requested early payment and, on 7 September 2004, he was provided with written notification setting out the then value of his entitlements. Thereafter, he made no further contributions to the Fund and the amounts that the OPCW would otherwise have paid to the Fund on his behalf were paid directly to his bank account.

3. On 25 February 2005, after receiving his bank statement showing the amount paid upon his separation from service, the complainant wrote to the Director-General requesting review of "the administrative decision associated with the payout of [his] Provident Fund money [...], which payout became fully operative and determined as of 31 December 2004, the date of [his] separation from the Technical Secretariat". He added that he was "seeking compensation for the Provident Fund losses [he] incurred during [his] tenure in the OPCW [...]". He sent two follow-up letters and, having received no reply by 25 April 2005, he lodged an appeal with the Appeals Council and simultaneously requested an extension of time within which to correct his submissions. On the same day a letter was sent to the complainant informing him that the Director-General had decided that his request for review was time-barred as he had been given written notification of his Provident Fund entitlements on 7 September 2004 but had not requested review within two months of that date, as required by Interim Staff Rule 11.2.02(a). On 2 June 2005 the complainant filed an internal appeal against the decision contained in that letter.

4. The Appeals Council upheld the Organisation's argument that the complainant's internal appeal was time-barred on the basis that a request for review should have been made within two months of 7 September 2004. Accordingly, it recommended that the appeal be dismissed. Acting on that recommendation, the Director-General dismissed the appeal and the complainant was so informed by letter dated 15 December 2005. That decision is the subject of the present complaint.

5. The OPCW maintains its argument that the relevant decision is that contained in the written notification dated 7 September 2004 and that, because a request for review was not made within two months of that date, the present complaint is not receivable. That argument must be rejected. Relevantly, the statement of 7 September was a notification of the then value of the complainant's entitlements in the Provident Fund. It was not a decision as to whether or not he was entitled to compensation for the capital loss, if any, sustained by him. However, that is not to

say, without more, that the complaint is receivable.

6. Ordinarily, there is no decision with respect to matters falling outside normal entitlements until a specific claim is made and either expressly or impliedly accepted or rejected (see Judgment 2538). In the present case, no specific claim for compensation was made until 25 February 2005 and there was no express decision until 25 April 2005 when the complainant was informed that his request for review was time-barred. However, it is well settled that a decision does not require any particular formality and may be constituted by any communication that is reasonably capable of being understood to constitute a decision on the matter (see Judgments 532 and 2573).

7. Subject to one qualification, a separating staff member is entitled to regard his/her final payslip on the payment of the sums therein recorded as embodying a decision that the staff member has only those entitlements that are reflected in the payslip. The qualification concerns specific prior claims that remain unresolved at the time of separation. In the present case, the complainant made no prior claim for compensation with respect to the capital loss, if any, reflected in the value of his interest in the Provident Fund. Accordingly, as the complainant contended in his letter to the Director-General of 25 February 2005, his final payslip is to be construed as a decision that he had no entitlement to compensation with respect to any such loss. Indeed, that is the basis on which the Tribunal approached the matter in Judgment 2403. In that case, the complainant sought review of the decision embodied in the payment made to his bank account upon his separation from service. The Tribunal treated that as “a decision that the OPCW was under no obligation to make good [...] the capital losses of the Provident Fund apportioned to [him]”. Accordingly, the complaint is receivable.

8. The complainant seeks to establish that he suffered a capital loss by comparing the contributions made between his joining the Provident Fund in September 1998 and mid-2002 with the value of his interest in the Fund in mid-2002 when he elected to change the investments in which his contributions were held. That period appears to have been selected because, as appears from Judgment 2403, the major losses of the Fund occurred in 2000 and 2001 and, thereafter, participants were allowed a limited choice as to the investments in which their contributions were to be held. However, as the OPCW correctly contends, Rule 5 of the Administrative Rules of the Provident Fund expressly provides that participants in the Fund have no right, interest or entitlement in the resources of the Fund. Their sole right is to receive payment of the value of their interest in accordance with the terms of the said Rules or in accordance with decisions made pursuant thereto. Thus, there can be no capital loss until payment is made and the only date on which the loss, if any, can be calculated is the date of that payment. In the present case, that is 7 September 2004.

9. The amounts paid to the complainant on that date were 173,638.11 euros and 29,859.30 United States dollars, respectively. It is not disputed that the latter amount was, at that date, equivalent to 24,813 euros. Thus, there was a total payment to the value of 198,451.11 euros. A statement from the Provident Fund annexed to the complaint shows that, as at 30 June 2004, the net contributions to the complainant’s account in the Fund amounted to 196,820.79 euros. It appears from the complainant’s payslip for July 2004 that a further amount of 2,314.41 euros was paid to his account at the end of that month and it is to be presumed that the same amount was paid at the end of August. On that basis, the total contributions were 201,449.61 euros less some small amount for administrative charges for the months of July and August 2004. Accordingly, there was a capital loss of approximately 2,990 euros.

10. The OPCW argues that the capital loss sustained by the complainant is referable to his decision to have part of his contributions held in US dollar investments. In this regard, it points out that there was a steady decline in the value of the dollar in relation to the euro between June 2002 and September 2004 and that, had the complainant elected to have all contributions paid to his account placed in investments in euros, he would have suffered no loss. Thus, it argues that any loss suffered by the complainant was entirely of his own making. That argument must be rejected. The dollar investments accounted for something less than 20 per cent of the complainant’s total holdings in the Fund. It is thus appropriate to attribute slightly less than 20 per cent of the loss suffered by the complainant to his decision to have part of his investments in dollars and slightly more than 80 per cent to the overall performance of the Fund. For the reasons given in Judgment 2403, it is impossible to regard all the losses sustained by the Fund as referable to the failure of the OPCW to establish an effective system to monitor its performance. In these circumstances, it is reasonable to regard the loss sustained by the complainant as a result of the failure of the OPCW in that regard as 1,500 euros.

DECISION

For the above reasons,

1. The Director-General's decision of 15 December 2005 is set aside, as is the decision of 25 April 2005.
2. The OPCW shall pay the complainant the sum of 1,500 euros, together with interest at the rate of 8 per cent per annum from 7 September 2004 until the date of payment.
3. It shall pay the complainant's costs of the proceedings before the Tribunal in the sum of 1,500 euros.

In witness of this judgment, adopted on 4 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Giuseppe Barbagallo

Catherine Comtet