

108th Session

Judgment No. 2883

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A.B.M. N. I. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 12 September 2008 and corrected on 10 November 2008, the Organisation's reply of 20 January 2009, the complainant's rejoinder of 20 February and the OPCW's surrejoinder of 18 March 2009;

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, a Bangladeshi national born in 1953, is a former staff member of the OPCW. He joined the Organisation on 8 January 2007 as an Inspector at grade P-3 under a three-year fixed-term contract. His appointment was subject to the satisfactory completion of a probationary period of six months.

On 17 January 2007 the complainant and other newly employed inspectors met with the Head of the Inspectorate Management Branch to discuss, among other things, the OPCW's training programme. From 26 February to 9 March the complainant attended a toxic chemical

training course in Canada. He subsequently received a certificate, signed by the Director-General of the Organisation, which stated that he had successfully completed that course.

On 13 March the complainant's supervisor completed his first probationary performance appraisal. The appraisal form indicated that the first of the complainant's four work plan objectives was the "successful completion of all modules of the training programme for new inspectors" and stipulated that he was required to pass all examinations during that training. His performance under that objective was rated as satisfactory but in need of improvement. No details were given as to which improvements were necessary. On 6 June his supervisor completed his second performance appraisal. He rated the complainant's performance under the first objective as unsatisfactory and gave him the same rating under the heading "Summary Performance Rating". He further commented that the complainant's performance during the training in Canada was considered unsatisfactory and that he was to attend additional training in Serbia at the end of June. He recommended a three-month extension of the complainant's probationary period, which was approved by the Director-General on 31 July 2007.

The complainant's proficiency during the training in Serbia was evaluated in an assessment dated 16 July 2007. It was noted that he did not meet the Organisation's required standards for toxic chemical training. Consequently, he was classified, according to the certification standards for inspectors proposed in memorandum M/INS/125269/07 dated 31 May 2007, as a "Category C" inspector who was "not certified as proficient for toxic entries", i.e. for entering contaminated areas.

On 11 September the complainant's third appraisal was completed by his supervisor for the extended probationary period. His performance under the first objective was again considered unsatisfactory and he was given a Summary Performance Rating of unsatisfactory. His supervisor and the second appraising officer recommended that his appointment not be confirmed, and the Director-General endorsed that recommendation on 18 September. The

complainant's appointment was extended until 7 November 2007, at which date he separated from service.

Meanwhile, by a memorandum of 26 September 2007, the complainant submitted a request for review of the decision not to confirm his appointment. In a letter dated 26 October he was informed that the Director-General was maintaining that decision and on 29 October he filed an appeal with the Appeals Council. In its report dated 9 May 2008 the Council concluded that the complainant was entitled to redress for the violation of procedures because the Organisation had not complied with the requirements of Administrative Directive AD/PER/21/Rev.2 during his probationary period.

By a letter of 9 June 2008 the Head of the Human Resources Branch informed the complainant that the Director-General had rejected his appeal. That is the impugned decision.

B. Citing the case law, the complainant argues that the OPCW breached the procedures set out in Administrative Directives AD/PER/21/Rev.1 of 12 December 2005 and AD/PER/21/Rev.2 of 11 June 2007, which regulate the implementation of the probationary period for staff members. He contends that the Organisation cannot base a decision on procedures that it does not follow and that it cannot rely on oral discussions as evidence that it complied with those procedures.

First, his supervisor did not meet him within two weeks of his entry on duty to explain the objectives he was expected to achieve during his probationary period and the criteria by which his success would be evaluated. Furthermore, his supervisor made no mention at the meeting of 17 January 2007 that newly employed inspectors had to be certified to make toxic entries in order for their appointments to be confirmed.

Second, the Organisation failed to give him timely and adequate written warning of the aspects of his performance that were considered unsatisfactory. Indeed, during the first five months of his appointment he was not given any feedback that could reasonably have led him to

believe that his performance was not satisfactory. The issue was raised for the first time during the meeting with his supervisor on 6 June 2007, but he was not given any assessment from the training course in Canada nor any other information indicating why he did not meet the required standards for that course.

Third, the defendant failed to provide him with adequate written warning that the confirmation of his appointment was at risk. On 6 June he was informed by his supervisor that the Inspectorate Management Branch had decided to make certification for toxic entries a condition of confirmation of inspectors' appointments, but he was not advised in writing or orally that failure to meet the required standard during his additional training in Serbia would lead to the non-confirmation of his appointment.

Fourth, the OPCW failed to give him the opportunity and time to improve his performance. Referring to the findings of the Appeals Council, he submits that, at the very least, he should have been afforded the opportunity to attend an Inspectorate Refresher Training course during his probation, in accordance with the new certification procedures set out in document QDOC/INS/SOP/GG009.

In addition, the complainant asserts that the Organisation breached the principle according to which international organisations may not apply rules retroactively. He submits that his performance was assessed using the new criteria defined in the above-mentioned document QDOC/INS/SOP/GG009, yet that document did not take effect until 5 October 2007. For the above-mentioned reasons, he asserts that the impugned decision contained errors of fact and law.

He also argues that the OPCW breached its duty to act in good faith and to respect his dignity. Referring to the case law according to which organisations must deal with their staff in a transparent manner, he points out that the assessment of his training in Canada was completed almost three months after that training. Furthermore, the OPCW failed to advise him in clear terms that his appointment was at risk, and he was subject to inconsistent and unfair treatment as a result of the Inspectorate Management Branch applying new

procedures and criteria for the training and assessment of inspectors before they came into effect.

Lastly, the complainant submits that he suffered injury to his well-being, dignity and professional reputation, for which he is entitled to moral damages.

The complainant asks the Tribunal to quash the impugned decision. He seeks reinstatement; material damages equivalent to the salary and emoluments that he would have earned from the date of his separation to the date of his reinstatement, plus interest; moral damages in the amount of 15,000 euros and 15,000 euros in costs.

C. In its reply the OPCW argues that, according to the case law, the decision not to confirm the appointment of a probationer is discretionary and that such decisions are subject to only limited review by the Tribunal. Furthermore, where the reason for non-confirmation of an appointment is unsatisfactory performance, the Tribunal will not replace an organisation's assessment with its own.

The Organisation submits that it fully complied with the relevant provisions of Administrative Directives AD/PER/21/Rev.1 and AD/PER/21/Rev.2. During the meeting of 17 January 2007, which the complainant attended, the Head of the Inspectorate Management Branch explained the performance objectives that all new inspectors were expected to achieve. Thereafter, the complainant received sufficient and timely written notice of the deficiencies in his performance through the probationary performance appraisals that were completed on 13 March, 6 June and 11 September 2007. The OPCW asserts that it can lawfully base a decision not to confirm an appointment on the written reasons contained in a performance appraisal report. It further asserts that separate written warnings are not required in circumstances where it is clear that confirmation of an appointment is contingent on the achievement of a performance objective requiring the successful completion of training. Moreover, the extension of the complainant's probationary period clearly indicated to him that his appointment was at risk.

The OPCW points out that it extended the complainant's probationary period and sent him for additional training in Serbia in order to provide him with the opportunity to improve his performance. Furthermore, contrary to the complainant's submissions, it acted in good faith. It did not retroactively apply new assessment criteria, but rather adapted its assessment methods in order to determine whether the criteria established at the beginning of the complainant's probationary period had been fulfilled.

D. In his rejoinder the complainant develops his pleas and reiterates his claims. He adds a copy of a substantial letter of recommendation given to him a few days before he left service, signed by the Director of the Inspectorate Division.

E. In its surrejoinder the OPCW maintains its position. It adds that it would not be appropriate to order the complainant's reinstatement, given his inability to complete successfully the Organisation's crucial toxic chemical training.

CONSIDERATIONS

1. The complainant joined the OPCW under a three-year fixed-term contract. The first six months of his appointment constituted a probationary period, which was extended for an additional three months.

2. The complainant's performance being considered unsatisfactory, his supervisor recommended that his appointment not be confirmed and the Director-General endorsed that recommendation. On 26 September 2007 the complainant requested a review of the decision not to confirm his appointment, which the Director-General rejected. On 29 October the complainant filed an appeal with the Appeals Council.

3. In its report dated 9 May 2008 the Appeals Council found that the certificate for the training course which the complainant had

followed in Canada, and the satisfactory rating he had obtained for the first objective on his initial probationary performance appraisal, supported the complainant's claim that he had passed the training and was performing satisfactorily. The Council also noted that the only reason given for the complainant's dismissal was his inability to pass the toxic chemical training, and that no other training sessions had been offered to him during the three-month extension of his probationary period. Accordingly, the Council unanimously recommended that:

- a. [The complainant] is entitled to a redress of the violation of procedures that occurred during the process of the non-confirmation of his appointment. The Council recommends that the Organisation meet with [the complainant] to come to an agreement which is mutually satisfying to both parties.
- b. The Appeals Council finds nothing wrong with the Inspectorate training but believes that the student feedback and training documentation methods should be made transparent and timely.
- c. Human Resources Branch [HRB] should become more active in the process when a staff member is having problems during the probationary period. The Appeals Council believes that had HRB intervened in this case they would probably have been able to catch and correct many of the administrative errors that occurred in this case."

4. In his letter dated 9 June 2008 notifying the complainant of the decision to reject his appeal, the Director-General stated, *inter alia*, that he noted that the findings of the Appeals Council contained errors of fact and law with regard to the evaluation of the complainant's performance during the probationary period, and the process by which the probationary period had been extended. He considered that, as a result of those errors, the conclusions by the Appeals Council were not consistent with the facts of the case or with the applicable rules, and he added that the only reason why a probationary period would be extended is to give the staff member another chance to improve on his or her performance.

5. The complainant puts forward the following pleas in support of his complaint: (a) the Organisation breached the procedures governing probation set forth in Administrative Directive

AD/PER/21/Rev.2; (b) the Organisation breached the principle that new rules may not be applied retroactively; (c) the Director-General's decision contained errors of fact and law; and (d) the Organisation breached its duty to act in good faith and to respect his dignity.

6. AD/PER/21/Rev.2 applies to all staff members serving a probationary period. Its purpose is "to regulate the implementation of the probationary period [...] in accordance with Staff Regulation 4.4(c)". The Appeals Council found *inter alia* that the Organisation had violated the requirements set forth in paragraph 19(d), (e) and (f) of AD/PER/21/Rev.2, which states:

"During probation, the designated supervisor shall:

[...]

- (d) indicate in writing to the staff member areas, if any, in which his/her performance is viewed as unsatisfactory, and, should this be the case, **suggest ways and means of improving the staff member's performance;**
- (e) make it clear in writing to the staff member, if his/her performance is considered to be unsatisfactory, that this could lead to a recommendation for either the extension of the probationary period as provided for in paragraph 13, or for non confirmation as provided for in paragraph 15; and
- (f) complete the performance report. Should the designated supervisor be of the view that the performance of the staff member is unsatisfactory after assessing the achievement of objectives and the performance dimensions, he/she **shall record in the performance report the ways and means suggested for the improvement of the staff member's performance.** The designated supervisor shall offer the staff member an opportunity to add his/her comments, and shall then submit the performance report, including any written comments that may have been added by the staff member, to the appropriate branch head, where applicable, and director for comments and signature."

7. The Organisation contests the complainant's claims and replies that the evidence demonstrates that he had notice through the probationary performance appraisal of 6 June 2007 and the extension of his probation that his appointment was at risk if his performance did not improve. It submits that the sole purpose of extending a

probationary period is to give the probationer a further chance to prove he is qualified for the job.

8. The Tribunal is of the opinion that the Director-General's decision not to renew the complainant's contract is based on errors of fact and law, and must therefore be set aside. The OPCW's reason for the non-confirmation of the complainant's appointment, as indicated in the complainant's third probationary performance appraisal, is that he failed the two toxic chemical training courses which he took in Canada and Serbia. That is incorrect, as the complainant was given a certificate for the successful completion of the course in Canada as well as a satisfactory rating in his first probationary performance appraisal for his performance under the first work plan objective, which required "[s]uccessful completion of all modules of the training programme". The comment written on the second performance appraisal, i.e. "[p]erformance during the [toxic chemical training] in Canada was considered unsatisfactory", is contradicted by the previously mentioned certificate and satisfactory rating and is an error of fact. Furthermore, based on the positive review and the certificate, the complainant had no reason to believe that his performance was putting the confirmation of his appointment in jeopardy. Even after the second performance appraisal, in which the complainant's Summary Performance Rating was unsatisfactory, he was not given any written warning that his contract was at risk of not being confirmed, nor was he instructed on ways to improve his performance in accordance with the terms of AD/PER/21/Rev.2. He was assigned to attend the toxic chemical training course in Serbia, but was not notified that the outcome of that course could determine the confirmation or non-confirmation of his appointment.

9. It is plain on the evidence that the three-month extension of the complainant's probationary period was ineffective as he was not given any opportunity during that period to follow another course and demonstrate an improvement, if any, in the skills required for his position. Nor was he given any detailed instructions on how to improve his performance during that period, in accordance with the

terms of AD/PER/21/Rev.2. Therefore, the Organisation's assertion that the extension of the probationary period was in and of itself a clear message that the complainant's performance was insufficient for confirmation is unfounded. The additional notes written on the second probationary performance appraisal state:

- “- Although the overall performance during the training was considered good, instructors assessed his performance during [toxic chemical training] to be below average and needing improvement.
- During the mock inspection in Switzerland (training) his performance was also considered to be below average, however, during a real inspection (OCH/433/07) the Team Leader reported his performance as very good (very professional).
- His performance during the OJT in USA [...] was also considered to be very good [...].”

The overall positive sense of these notes, along with the lack of clear communication to the contrary from the Organisation, supports the complainant's claim that he was not given any reason to believe his performance was leading to the non-confirmation of his contract. Moreover, it is to be noted that on 1 November 2007, a few days before the complainant left service on 7 November, he had been “unreservedly commended” to future employers by the Director of the Inspectorate Division, who praised his “high level of professional competence, technical knowledge and commitment to his work”, and stated that “his valuable contribution” to inspection activities completed after his training had been “greatly appreciated by the inspection team leader”. As the above-mentioned errors of fact and law are enough to vitiate the decision, the Tribunal finds it unnecessary to consider the complainant's other claims.

10. The complainant seeks reinstatement, compensation for material and moral injury, and legal costs. The Tribunal holds that reinstatement, which could only be as a probationer without any guarantee of confirmation, would raise practical difficulties because of the time that has elapsed since the termination of the complainant's appointment and the scheduling conflicts that may occur between the training courses and the new probationary period (as occurred during the complainant's three-month probationary period extension).

Therefore, the Tribunal finds it appropriate not to order reinstatement but it will award the complainant material damages in the amount of 35,000 euros for the loss of a valuable opportunity to have his appointment confirmed. The complainant is entitled to 15,000 euros in moral damages for the affront to his dignity and the stress stemming from the Organisation's unlawful decision. The complainant is also entitled to costs, which the Tribunal sets at 3,000 euros.

DECISION

For the above reasons,

1. The Director-General's decision of 9 June 2008 is set aside.
2. The OPCW shall pay the complainant material damages in the amount of 35,000 euros.
3. It shall pay him moral damages in the amount of 15,000 euros.
4. It shall also pay him costs in the amount of 3,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 28 October 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Agustín Gordillo
Giuseppe Barbagallo
Catherine Comtet