

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**S.**  
**v.**  
**OPCW**

**125th Session**

**Judgment No. 3913**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms E. S. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 9 September 2015 and corrected on 14 December 2015, the OPCW's reply of 29 April 2016, the complainant's rejoinder of 22 August and the OPCW's surrejoinder of 25 November 2016;

Considering Article II, paragraph 5, of the Statute of the Tribunal;  
Having examined the written submissions;

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

The complainant challenges the decision to terminate her appointment at the end of her probationary period.

On 3 November 2013 the complainant joined the OPCW under a three-year fixed-term contract as a Technical Support Officer at grade P.3. The confirmation of her appointment was subject to her satisfactory completion of a six-month probationary period.

On 29 January 2014 the complainant received her first probationary performance report. Her supervisor evaluated her work as unsatisfactory with respect to the objectives to be met and her professionalism. The complainant's comments thereon were recorded in the report. Two days later she met with her supervisor and the Head of the Human Resources Branch (HRB) to discuss her work and her supervisor's expectations. According to the minutes of the meeting

provided by the complainant, the meeting ended on a very positive note with the complainant agreeing to give everything to making it work and the supervisor agreeing to provide her with his continuous support.

An additional probationary performance report was prepared and communicated to the complainant on 7 March. Her supervisor again evaluated her performance as unsatisfactory with respect to the objectives to be met and her professionalism. The complainant also made some comments that were recorded in the report.

The complainant's final probationary performance report was completed and signed on 8 April. Her performance was rated unsatisfactory and her supervisor recommended not confirming her appointment. On 11 April she went on sick leave.

By a memorandum of 14 April the complainant was informed that, having carefully reviewed the probationary performance report and her written comments thereon, the Director-General had decided not to confirm her appointment at the expiry of her probationary period on 2 May 2014, because the evidence indicated that she was not suitable for continued employment with the OPCW.

On 22 April the complainant requested the Director-General to review his decision, to extend her probationary period and to assign her to a different unit. She supplemented her request for review by a letter of 9 May, asking that the contested decision be withdrawn, that she be retroactively reinstated in her former position or, in the event that this was not possible, that she be paid two years' salary. She also sought the payment of "actual and consequential damages", moral damages, costs and interest on the amounts claimed. Her request for review was rejected on 19 May.

On 12 June she filed an appeal with the Appeals Council challenging that decision. On 16 June 2014 she submitted additional comments to the Appeals Council alleging that the illness for which she had been on sick leave in April was service-incurred. The Appeals Council issued its report on 22 May 2015 concluding that the Director-General had complied with relevant rules in taking and communicating the decision not to confirm the complainant's appointment. Noting that the complainant was not on sick leave when the performance report was

completed and signed, the Appeals Council held that it was irrelevant that the letter informing her of the non-confirmation of her appointment had been issued while she was on sick leave. It considered that neither her absence on sick leave nor the question of whether her illness was service-incurred was relevant to her appeal. The Appeals Council therefore recommended that her request for compensation should be dismissed.

On 12 June 2015 the complainant was notified that the Director-General had decided to follow the Appeals Council's recommendation and hence to reject her request for compensation and maintain his decision not to confirm her appointment. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order that she be reinstated in her former position with payment of all amounts that would have been due to her had her appointment not been terminated (including salary, step increases, benefits, entitlements, pension contributions) until the date of reinstatement. In the event that she is not reinstated, she seeks payment of two and a half years' gross salary, including step increases, benefits, entitlements and pension contributions. She also claims "actual and consequential damages", moral damages, costs for the internal appeal process, as well as interest at the rate of 5 per cent per annum on all amounts awarded to her.

The OPCW asks the Tribunal to dismiss the complaint in its entirety.

### CONSIDERATIONS

1. The complainant impugns the decision dated 12 June 2015, which notified her that the Director-General had accepted the Appeals Council's recommendation to dismiss her internal appeal against the decision of 14 April 2014 not to confirm her three-year fixed-term appointment when her probationary period ended on 2 May 2014. In the memorandum of 14 April 2014 the Head of HRB stated that that decision was taken "because the evidence presented to [the Director-General] indicate[d] that [she was] not suitable for continued employment with the Organisation". This complaint invites the Tribunal to consider

the integrity of the performance appraisal process and the lawfulness of the non-confirmation decision, but not the merits of the performance appraisals.

2. Since this case is concerned with the non-confirmation of appointment after a probationary period, the Tribunal notes that Administrative Directive AD/PER/21/Rev.3 (the Directive) states the purpose of such period as follows:

“The purpose of the probationary period is to determine whether a staff member is suitable for employment with the Organisation. During the probationary period the staff member’s appointment is on a trial basis. At the end of the probationary period, a determination is made whether or not to confirm the appointment.”

The Tribunal also notes that the basic principles governing probation have been consistently stated, for example, in Judgment 2646, consideration 5, as follows:

“[T]he Tribunal recalls that the reason for probation is to enable an organisation to assess the probationer’s suitability for a position. For this reason, it has recognised that a **high degree of deference ought to be accorded to an organisation’s exercise of its discretion regarding decisions concerning probationary matters including the confirmation of appointment**, the extensions of a probationary term, and the identification of its own interests and requirements. The Tribunal stated in Judgment 1418, under 6, that a discretionary decision of this kind will only be set aside ‘if taken without authority or in breach of a rule of form or of procedure, or if based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority’. It also reaffirmed that ‘**where the reason for refusal of confirmation is unsatisfactory performance, [it] will not replace the organisation’s assessment with its own**’.” (Emphases added.)

This case law was recently confirmed in Judgment 3844, consideration 4.

3. The complainant essentially challenges the impugned decision on the following five grounds:

- (1) The original decision stated no reasons for not confirming her appointment.

- (2) In not confirming her appointment, the OPCW violated its own rules, particularly paragraphs 18(d) and (f) of the Directive as well as an established principle of international civil service law, because it did not provide her with any guidance in the performance of her duties.
- (3) In not confirming her appointment, the OPCW violated its own rules as well as an established principle of international civil service law, because it did not specifically warn her that her performance was unsatisfactory and that she risked her appointment not being confirmed if it did not improve.
- (4) Her supervisor's recommendation not to confirm her appointment was tainted with misrepresentation of facts and with bias.
- (5) The decision of 14 April 2014 not to confirm her appointment was unlawfully taken while she was on "service-incurred sick leave" and without considering recourse to paragraph 12 of the Directive.

4. To support ground 1, the complainant relies on the general principle that a staff member of an international organisation is entitled to be informed of the reason(s) for an administrative decision which adversely affects her or him. She submits that "except for stating that [she] was not suitable for continued employment [...] the original decision contained no substantiation whatsoever". She also submits that this violated the consistently stated principle that a decision maker has a duty to substantiate a final decision. According to the complainant, reasons were necessary, given that paragraph 23 of the Directive requires the final decision to take into consideration a staff member's comments in the performance reports and related recommendations.

Relevantly, paragraph 23 requires that where a supervisor decides not to recommend the confirmation of an appointment or the extension of the probationary period because of a probationer's unsatisfactory performance, the Head of HRB shall send the performance report containing the recommendation of the supervisor, the comments of the branch head and/or the Division Director, as well as those of the probationer, to the Director-General for decision.

5. The complainant relies on Judgment 675, consideration 11, to support the above stated general principle, but in that case the principle was applied to confirm the requirement of a valid reason not to renew a fixed-term appointment. She relies on Judgment 946, consideration 6, to state that the purpose of the general rule is to permit a staff member whom the decision affects to know the reasons for it so as to be able to lodge an appeal. As the OPCW points out, the Tribunal's finding of an error in Judgment 946 was based on the fact that the complainant had not been given any reasons for the decision at any point, either in the decision, in an explanatory letter or "in any other way". The complainant also relies on Judgment 2121. However, as the OPCW points out, that case concerned a recommendation by an advisory body for non-renewal of an appointment which contained no reasons.

6. In the present case, the reasons for the non-confirmation of the complainant's appointment were adequately adumbrated in the three performance reports. The complainant had made extensive comments on the stated reasons. In summary, those reports had explained in detail that her performance was consistently rated as unsatisfactory mainly because of unprofessionalism, in one instance "recording a conversation with a co-worker without disclosing the recording"; her "difficulty working with colleagues, leading to a lack of teamwork"; her lack of interaction with the laboratory staff; her inability to take initiatives independently to familiarize herself with aspects of her work; the late submission of technical specifications; her apparent reluctance to work long hours to complete assigned tasks; and, critically, her inability to write proper technical specifications for equipment, which was a recruitment prerequisite and an essential aspect of the duties of her post, with no discernible improvement despite extensive feedback. Her supervisor's memorandum of 2 April 2014 in which he recommended the non-confirmation of her appointment to the post also contained some of these reasons.

In the foregoing premises, the Tribunal determines that the complainant received adequate reasons for the decision not to confirm her appointment. The Head of HRB had correctly stated, in the memorandum of 14 April 2014, that the Director-General having

considered the performance report, including her comments, as well as her supervisor's recommendation, had decided not to confirm her appointment as the evidence contained therein indicated that she was unsuitable for continued employment with the OPCW. Ground 1 of the complaint is therefore unfounded.

7. The Tribunal also finds that ground 2 of the complaint, in which the complainant contends that the OPCW violated international civil service law and paragraphs 18(d) and 18(f) of the Directive, is unfounded. Paragraph 18(d) required her supervisor to ensure that she received appropriate guidance and training to enable her to perform her duties. Paragraph 18(f) relevantly states that during probation, the designated supervisor shall:

“f. for staff members on a six month probationary period, indicate in writing to the staff member areas, if any, in which his/her performance is viewed as ‘improvement required’ or ‘unsatisfactory’, and, should this be the case, suggest ways and means of improving the staff member’s performance during the remaining period of probation. Specify the support and assistance that will be provided to the staff member. [...]”.

8. The three performance reports, as well as the minutes of the meeting of 31 January 2014 between the complainant, her supervisor and the Head of HRB, show that the complainant was provided with clear guidance in the performance of her duties throughout her probationary period. The minutes of the meeting of 31 January 2014 referred to her performance, her expectations and those of her supervisor, as well as the support which she needed and the initiatives which she was to take towards their realization. Although the complainant was not given the opportunity to pursue some of the training which she requested, the evidence shows that she benefitted from appropriate on-the-job training. She also pursued online training programmes.

9. With regard to ground 3, the right of a probationer to a prior written warning is conferred by the Directive. Paragraph 14 states that the appointment of a staff member whose performance is found to be unsatisfactory according to the performance report will not be confirmed.

Paragraph 18(f), cited above, goes on to indicate that during the probation, the designated supervisor shall:

“f. [...] Indicate clearly in writing to the staff member, if his/her performance is considered to be less than satisfactory and warrants a rating of ‘unsatisfactory’ or ‘improvement required’ that this could lead to a recommendation for either the extension of the probationary period as provided for in paragraph 12, or for non confirmation as provided for in paragraph 14.”

10. The OPCW insists that it adequately warned the complainant that she risked non-confirmation of her appointment unless her performance improved. The OPCW states that the first performance report confirms this.

11. The OPCW relies mainly on the following statement which is highlighted at the end of Part 2 of the first performance report: “[s]taff member to be informed that consequences of failing to improve performance during the remaining period of probation shall lead to a recommendation for either extension of probationary period or non confirmation”. The entries in Part 2 of the report show that the complainant obtained an unsatisfactory rating with respect to the objectives to be met; that she did not meet the set objectives of her work and details were provided; she obtained an unsatisfactory rating for professionalism and the reasons were detailed. The proposed support which was to be provided to the complainant to assist the improvement of her performance was also detailed. The OPCW received the complainant’s comments with supporting documents on 19 February 2014. This was after her first meeting with her supervisor to discuss the appraisal. The minutes of the meeting of 31 January 2014 show that performance milestones were set for her. In the minutes of the meetings the complainant also noted, under the heading “Consequences”, that “[i]t [was] up to the staff member to show in tangible terms that he/she [was] making a contribution and [was] fitting in. Every effort [was] given to support the staff member but finally it [was] the staff member who ha[d] to demonstrate that he/she [could] be confirmed for a more long term career with the OPCW.”

12. The complainant contends that she was provided with no clear indication that she risked non-confirmation of her appointment because the statement in Part 2 of the first appraisal report was a mere generic one and not sufficiently specific and that, in any event, it was not brought to her attention. She also submits that the inclusion of a specific term in her final report, one month prior to the end of the probationary period, did not meet the requirement of a clear and timely warning of the risk of non-confirmation established by the Tribunal's case law. The words "specific term" seem to be a reference to the supervisor's signification that non-confirmation of the complainant's appointment was not recommended by ticking the appropriate box on the form. However, contrary to paragraph 18(f) of the Directive, the complainant did not receive a written warning that the confirmation of her appointment was at risk. The OPCW was therefore in violation of this rule. Ground 3 of the complaint is therefore well founded and the impugned decision will be set aside.

13. However, the award of material damages for the loss of opportunity to have her appointment confirmed, and moral damages will be minimal. It is noted that the complainant was aware that the probationary period was intended to assess her suitability for her post and that her appointment was on a trial basis. The Tribunal further notes the inclusion of the above-mentioned statement in her first performance report, albeit generic in nature, coupled with the fact that she signed and provided detailed comments on that report. Having regard in particular to the meeting of 31 January 2014; the fact that the complainant was given an additional performance appraisal, which, according to paragraph 11 of the Directive, a supervisor may make "at any time if he/she thinks that the staff member's work is unsatisfactory or if improvement is required"; the unsatisfactory rating which the complainant was given in that additional performance report concerning the objectives to be met as well as in the final report, which she signed and commented upon; the supervisor's specific recommendation in the final report that the complainant's appointment be not confirmed for unsatisfactory performance and the contents of the supervisor's memorandum of 2 April 2014 recommending non-confirmation and on

which the complainant was invited to comment; the comments the complainant submitted before the Director-General's decision of 14 April 2014 not to confirm her appointment, the Tribunal therefore will award the complainant material and moral damages in the total amount of 2,000 euros.

14. With respect to ground 4, it is observed that the complainant's allegations of her supervisor's misrepresentation of the facts and bias against her are captured in her statements that he treated her "unfavourably and irregularly with respect to the (lack of) provision of appropriate guidance and training and [...] at the same time wrongly portrayed [her] as an employee having difficulties in collaborating with her colleagues from the beginning of her assignment". She further submits that her supervisor "misrepresented (or omitted relevant) facts regarding [her] performance, inter alia, with respect to requisition raised by her, her progress in February 2014, failure to mention that the initial six weeks performance was evaluated against targets set for the entire probationary period or that no proper access to software was available to [her] in the first four weeks of her service".

15. The Tribunal views the last submission as inaccurate. The objectives listed in the complainant's first performance report were initial entry objectives. For example, the success criteria for objective 1 state that by the end of 2013 the complainant should have known and understood the basics of working at OPCW and obtained the knowledge necessary to achieve objective 2. Objective 3 states that the complainant was to become familiar with the laboratory and begin to be proficient in the use of some specifically designated instruments and possibly other instruments and to understand the process of dispatching them on missions. Objective 4 required the complainant to become familiar with facility management, the Unit's stocks and supplies and chemicals, to commence implementing the chemical management system and to become familiar with the budget process. Further, it is apparent that the appraisal was conducted on the basis of these objectives and that the additional as well as the final appraisals were conducted in the same way. It has already been determined that the complainant was provided

with appropriate on-the-job training and guidance to facilitate the performance of her duties as paragraph 18(d) of the Directive required. The areas of weakness in the complainant's performance were fairly listed in the performance reports and it is not apparent that the impediments to which she refers were still operative to adversely impact her additional or final performance reports. Neither does the Tribunal discern that the misrepresentation which she alleges was so operative. Additionally, as the complainant provides no evidence to substantiate her allegation of bias, ground 4 of the complaint is unfounded.

16. Regarding ground 5, the Tribunal observes, first, that none of the medical certificates which the complainant submits shows that she was on service-incurred sick leave when the decision was taken not to confirm her appointment, as she alleges. It is noteworthy that in her rejoinder the complainant does not respond to that observation which the OPCW made in its reply. In any event, there is no principle that prevents an organisation from deciding not to confirm the appointment of a probationer who is on sick leave.

17. As to the complainant's allegation that the OPCW acted unlawfully when it did not have recourse to paragraph 12 of the Directive before making the decision not to confirm her appointment, this provision relevantly states as follows:

"If, in the view of the designated supervisor, the staff member's performance at the end of the probationary period has been found to be less than satisfactory and warrants a rating of 'unsatisfactory' or 'improvement required', but there is a realistic prospect of the staff member improving sufficiently within the period of extension to meet the required performance standards, the designated supervisor may recommend the extension of the probationary period to the appropriate branch head, where applicable, and division director. The designated supervisor may also recommend an extension because it has not been possible to fully assess the staff member's performance due to extenuating circumstances. An extension of the probationary period may be granted by the Director-General in the best interest of the Organisation [...] before he/she takes a final decision on the confirmation of the appointment."

18. Essentially, a supervisor's decision whether to recommend the extension of a staff member's probationary period lies within the supervisor's discretion, which is to be exercised for the specified reasons. Paragraph 12 of the Directive also confers discretion on the Director-General to decide whether to extend a probationary period, which discretion is to be exercised solely in the best interest of the OPCW. The Tribunal finds nothing unlawful in the fact that neither the supervisor nor the Director-General considered it appropriate to extend the complainant's probationary period. Accordingly, ground 5 of the complaint is unfounded.

19. The complainant also alleges that she did not receive proper guidance concerning the time that she could have remained in the Netherlands after her separation, her status during that period, the removal of her personal effects and various medical issues (there was no medical examination at the end of her probationary period), including the medical expenses which she incurred on return to her home country (she purchased her own ticket home). The complainant contends that these failings by the OPCW caused her further distress. The Tribunal notes that these issues were not raised as discrete grounds in the complaint but under what it has dealt with in this judgment as ground 5. As there is insufficient evidence to substantiate these allegations, they will be dismissed.

20. In light of the outcome of this case, the application for oral hearings, which the complainant makes, is denied.

21. In the circumstances, the complainant's other claims, including her claim for reinstatement, will be dismissed.

#### DECISION

For the above reasons,

1. The impugned decision of 12 June 2015 is set aside.

2. The OPCW shall pay the complainant material and moral damages in the total amount of 2,000 euros.
3. The OPCW shall pay the complainant costs in the amount of 5,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 27 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ