

**M. (No. 3)**

*v.*

**OPCW**

**127th Session**

**Judgment No. 4069**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr K. M. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 26 September 2016 and corrected on 24 October 2016, the OPCW's reply of 3 February 2017, the complainant's rejoinder of 15 May and the OPCW's surrejoinder of 31 August 2017;

Considering Articles II, paragraph 5, and VII 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 contests the direct appointment of Mr D. and Mr A. to two D-2 level posts.

On 8 July 2014 the Director-General announced to the OPCW Executive Council the appointment of Mr D. as Director of the Verification Division. On 2 October 2014 an email was sent to all Directors and Branch Heads informing them of the appointment that same day of Mr A. as Director of the Administration Division. On 4 September and 28 November 2014, respectively, the complainant, who was at the time Head of the International Cooperation Branch at the D-1 level, requested a review of the decisions to appoint Mr D. and Mr A. He asked that their appointments be quashed immediately and that a competition for each of the posts be opened. He also sought material and moral damages

and costs. Further to the rejection of his requests for review, the complainant lodged two appeals with the Appeals Council, on 10 October and 30 December 2014, challenging the respective appointments.

The Appeals Council issued its reports on the complainant's appeals on 29 April 2016 recommending their rejection. By a letter of 29 June 2016, the complainant was informed that the Director-General considered that there was no legal basis for rescinding the appointments of Mr D. and Mr A. and that he had therefore decided to endorse the Appeals Council's recommendations to dismiss his appeals. That is the impugned decision.

In his complaint form, the complainant asks the Tribunal to rescind the decisions to directly appoint Mr D. as Director of the Verification Division and Mr A. as Director of the Administration Division, without prejudice to the rights of either of them, and to order the OPCW to pay him the additional salary, benefits, entitlements, including step increases and pension contributions, and any other emoluments that he would have received had he been selected for either of these posts and promoted to the D-2 level, with retroactive effect from 8 July 2014 (the date of the first irregular direct appointment) through the date of his "forced" retirement in June 2015. He also claims moral damages in an amount not less than 250,000 Swiss francs, costs, interest on all amounts awarded to him, and such other relief as the Tribunal deems just, fair and necessary.

In his brief, the complainant also requests that the OPCW be ordered to immediately open a competition for each post, to examine his candidature for the two vacancies as if he were an internal candidate and, in the event that he is selected for either post, to offer him a fixed-term contract retroactively from June 2015, the date of his separation from the OPCW, through June 2019, when he will reach the statutory retirement age. Alternatively, he claims damages corresponding to the salary, benefits, entitlements, including step increases and pension contributions, and any other emoluments he would have received if he had successfully competed for either post, retroactively from June 2015 through June 2019.

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

## CONSIDERATIONS

1. The complainant impugns the decision communicated to him by a letter dated 29 June 2016. In that letter, the Director-General accepted the Appeals Council's recommendations to dismiss his internal appeals against the decisions to appoint Mr D. as Director of the Verification Division and Mr A. as Director of the Administration Division (two D-2 level posts). In so doing, the Director-General agreed with the Appeals Council that the OPCW had complied with the relevant internal rules, regulations and directives in handling the complainant's claims and had made good faith efforts to meet his requests.

2. The complainant, who held a D-1 level post, had challenged the direct appointments of Mr D. and Mr A., respectively, to the subject posts on the ground that he (the complainant) was qualified to apply for those posts and was not given an opportunity to compete for them because Mr D. and Mr A. were appointed without going through a competitive and transparent process. The complainant argued that this was in violation of Staff Regulation 4.3 and established principles of the international civil service law. He maintains this assertion in the complaint and further contends that, in taking the impugned decision, the OPCW improperly applied its rules by giving undue weight to Administrative Directives over its Staff Regulations and Interim Staff Rules, particularly Staff Regulation 4.3. As for Administrative Directive AD/PER/29/Rev.3 regarding the OPCW Recruitment and Selection Procedures, the complainant argues that the amendment of this Directive did not grant the Director-General authority to make direct appointments to the subject posts and, in any event, the Directive does not override Staff Regulation 4.3.

3. The following provisions are relevant to the determination of this complaint:

(a) Article VIII, paragraph 44, of the Chemical Weapons Convention relevantly provides:

"The Director-General shall be responsible to the Conference and the Executive Council for the appointment of the staff and the organization and functioning of the Technical Secretariat. The paramount consideration in the

employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. [...]"

**(b) Staff Regulation 4.3 relevantly provides:**

"Selection of staff shall be made without distinction as to race, gender or religion. So far as practicable, selection shall be made on a competitive basis. Selection and appointment of candidates shall also be done in a manner that ensures transparency of the process [...]"

Paragraphs 2 to 6 of Administrative Directive AD/PER/29/Rev.3 reinforce the requirement in Staff Regulation 4.3 that selection for posts is to be on a competitive basis "[s]o far as [is] practicable". However, under paragraph 7 of the Directive, the Director-General has the prerogative to make appointments to posts at the D-2 level and above and to the posts of Chief of Cabinet and Deputy Chief of Cabinet in the Office of the Director-General based on recruitment and selection procedures which differ and depart from those specified in the Directive.

4. The complainant relies on Judgment 2959 to support his contention that the appointment of Mr D. and that of Mr A. to their respective posts without a competitive process was unlawful. In Judgment 2959 the Tribunal determined that the impugned decision, by which the post of Chief of Cabinet had been filled without a competitive process, violated the complainant's right to compete for the post because Staff Regulation 4.3 provides no explicit or specific exemption from the requirement that selection be made on a competitive basis for the post of Chief of Cabinet and the "impracticability" of the competitive selection process cannot be based on the post itself. The Tribunal stated that, furthermore, the Director-General had not provided any reasons why he considered a competition as not practicable in filling the vacant post, which demonstrated a lack of transparency in the appointment. The Tribunal therefore found that the impugned decision violated provisions which were designed to ensure a certain level of transparency and competition for all posts, and specifically referred to paragraph 11 of Administrative Directive AD/PER/29/Rev.2 and paragraphs 8 and 10 of Administrative Directive AD/PER/37/Rev.1, which were then in force. The Tribunal stated that, contrary to the Organisation's arguments, the

aforementioned provisions, which provided that vacancy notices shall be posted and that when vacancies are open to external candidates such notices shall be posted both internally and externally, and that full regard shall be given to internal candidates in the competitive selection process, were not inconsistent with the authority of the Director-General, but rather reinforced the necessity for transparency in the appointment process. The Tribunal further stated that the expression “so far as practicable” cannot be interpreted to mean that for certain specific posts a competitive selection process can automatically be considered as not practicable. The Tribunal also noted that in Judgment 2620, referring to the expression “so far as practicable”, it had held that “those words confer power on the Director-General to determine whether or not a competition is practicable. However, that is not a general or unfettered discretion. There must be something in the circumstances of the vacancy upon the basis of which the Director-General might reasonably conclude that a competition is not practicable.”

5. It is determined that the contested appointments of Mr D. and Mr A. were unlawful. Administrative Directive AD/PER/29/Rev.3, with the prerogative which paragraph 7 mentions, came into force subsequently to the facts giving rise to Judgment 2959. The OPCW argues that the situation in Judgment 2959 was different from that in the present case in that the Organisation is not presently invoking the argument of impracticability to exempt the contested appointments from the competitive procedures, but is merely applying paragraph 7 of Administrative Directive AD/PER/29/Rev.3 as an “explicit and specific rule” which exempts the contested appointments from the competitive process referred to in Staff Regulation 4.3. The OPCW further contends that paragraph 1 of Administrative Directive AD/PER/29/Rev.3 expressly gives effect to its Staff Regulations and Interim Staff Rules, by establishing detailed policies and procedures for the selection of staff so that there is no conflict between the Staff Regulations and the Directive. Further, the OPCW argues that the States Parties which approve the Staff Regulations participated in the procedure by which the two contested appointments were made.

6. However, in consideration 9 of Judgment 3993, which was delivered in public after the completion of the written proceedings in the present case and which also concerned an appointment made by the Director-General to a D-2 level post without a competitive process, the Tribunal found that paragraph 7 of Administrative Directive AD/PER/29/Rev.3, which gives the Director-General the prerogative to make appointments to the specified posts based on recruitment and selection procedures which do not involve a competitive process, did not provide a basis for the appointment that exempted it from the analysis in Judgment 2959. More specifically, notwithstanding that paragraph 7 of the Directive gives the Director-General the prerogative to make appointments to D-2 level posts, as are the contested posts in this complaint, it specifies that such appointments must however be based on “recruitment and selection procedures”. The consultation with the States Parties and with “relevant delegations and regional groups” did not satisfy paragraph 7 of the Directive, which requires “recruitment and selection procedures”, particularly in the light of Staff Regulation 4.3 which requires that the recruitment and selection be done on a competitive basis that ensures transparency. Accordingly, the impugned decision, contained in the letter dated 29 June 2016, to maintain the appointments of Mr D. and Mr A. to the subject posts must therefore be set aside, as must the earlier decisions appointing them to those posts. This will be on the understanding that the OPCW shall shield Mr D. and Mr A. from any injury that may flow from the setting aside of the impugned decision and of their appointments, which they accepted in good faith. Given the effluxion of time, no order will be made for new competitions to fill the subject posts.

7. In light of this decision, it is unnecessary to consider the complainant’s application for hearings under Article 12, paragraph 1, of the Tribunal’s Rules, or his application for the production of additional documents.

8. The complainant seeks an award of “actual damages, with full retroactivity, all additional salary, benefits, entitlements, including step increases and pension contributions, and any other emoluments he

would have received had he been selected for either of said posts and been promoted to grade D2, from 8 July 2014 (the date of the first irregular direct appointment) through his statutory date of [...] retirement”. There is no basis for such an award which, in effect, would be material damages. Such an award cannot be made on a mere expectation that his application for either post might have been successful. However, he is entitled to 4,000 euros in moral damages for the violation of his right to compete for the posts. He is also entitled to costs in the amount of 5,000 euros.

#### DECISION

For the above reasons,

1. The impugned decision, contained in the letter dated 29 June 2016, is set aside, as are the original decisions to appoint Mr D. and Mr A. to the subject posts.
2. The OPCW shall ensure that Mr D. and Mr A. are shielded from any injury that may flow from the setting aside of the impugned decision and of their appointments which they accepted in good faith.
3. The OPCW shall pay the complainant moral damages in the amount of 4,000 euros.
4. The OPCW shall pay the complainant costs in the amount of 5,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2018, 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 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ