

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**130th Session**

**Judgment No. 4297**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr L. S. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 2 January 2019, the OPCW's reply of 16 April, corrected on 3 May 2019, and the email of 25 June 2019 by which the complainant's counsel informed the Registrar of the Tribunal that the complainant would not file a rejoinder;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant impugns the decision to reject his formal complaint of harassment.

The complainant is a former OPCW staff member who separated from service on 5 January 2016. Prior to his separation, on 30 November 2015, he filed a formal complaint of harassment against seven staff members. On 16 December 2015 he filed a corrigendum. Further to the Director-General's decision to authorise an official investigation into the matter, the complainant was informed on 20 April 2016 of the appointment of an investigator and a co-investigator in his case.

The complainant objected to the appointment of the two investigators and asked that they be removed, that the investigation be suspended and that independent, neutral and competent individuals be appointed to carry out a new investigation. These requests were rejected by emails of 18 May and 3 June 2016. The complainant requested a review of the 18 May and 3 June 2016 decisions, but his request was rejected on 25 July 2016, on the ground that the appointment of investigators was only a step in the process, not an administrative decision subject to review. On 22 August 2016 the complainant submitted an appeal against the 25 July 2016 decision, requesting that it be set aside and that a competent investigative panel be appointed to investigate his complaint of harassment. That same day, the complainant made a request for the immediate suspension of all investigative actions by the two investigators. This request for suspension was rejected by the Director-General on 19 December 2016 in line with the Appeals Council's recommendation.

While these events were unfolding, the Secretary of the Investigation Panel invited the complainant on 21 April 2016 to indicate his availability for an interview and to provide the Investigation Panel with any evidence relevant to his complaint of harassment. The Secretary sent reminders on 4 and 17 May. In the latter, she indicated that the investigators would proceed on the assumption that the complainant did not wish to respond. On 12 July, the draft Investigation Report was transmitted to the complainant with an invitation to submit his comments, which he did on 20 July 2016. The Final Investigation Report was submitted on 23 August 2016. It concluded that the evidence did not support the complainant's allegations and did not substantiate a determination of harassment.

By a letter of 5 September 2016, the complainant was notified of the Director-General's decision to reject his formal complaint of harassment on the ground that the behaviour denounced by the complainant in his complaint did not constitute harassment within the meaning of the Administrative Directive on Harassment. On 20 February 2017 the complainant requested a review of this decision. On 15 March 2017 this request for review was rejected as time-barred, because the complainant had failed to submit it within the two-month time limit laid down in Interim Staff Rule 11.2.02(a). On 23 April 2017 the complainant lodged an appeal against the 15 March rejection of his request for review. In its report of 27 August 2018, the Appeals

Council concluded that the complainant had failed to request a review of the Director-General's 5 September 2016 decision within the applicable time limit and it recommended that the appeal be dismissed. By a letter of 28 September 2018, the complainant was informed that, for the reasons given by the Appeals Council and the Administration in the course of the appeal proceedings, the Director-General had decided to reject his appeal of 23 April 2017. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award him 25,000 euros in material damages for the loss of career progression, 250,000 euros in moral damages for the harassment he endured, as well as such other relief as the Tribunal deems just, fair and appropriate. He requests the reimbursement of all legal costs incurred by him and he seeks interest on all amounts awarded by the Tribunal.

The OPCW asks the Tribunal to dismiss the complaint as time-barred and thus irreceivable and, subsidiarily, as devoid of merit.

### CONSIDERATIONS

1. The complainant was, at relevant times, a member of the staff of the OPCW until his separation from the Organisation on 5 January 2016, when his then contract concluded. On 30 November 2015 he filed a formal complaint of harassment, which he corrected on 16 December 2015. Steps were taken by the OPCW in early 2016 to investigate the complaint and an investigator and co-investigator were appointed in February and April 2016 respectively. Shortly thereafter, the complainant challenged the competence of the investigators and, by email dated 24 April 2016 to the Director-General, requested that the two investigators be removed and that the "investigation [be recommenced] afresh with neutral investigators". At least implicitly, this request was rejected by email dated 18 May 2016 from the Director of Administration expressly responding on behalf of the Director-General. Without descending into detail, the complainant continued to pursue with the Administration his allegation that the appointed investigators should not continue the investigation. Notwithstanding, the investigation did continue culminating in a decision of the Director-General of 5 September 2016 rejecting the complainant's complaint of harassment.

2. The OPCW argued, in the internal appeal process, that the complainant had two months within which to begin the first step of appealing, namely seeking a review of the 5 September 2016 decision. It argued that this is required by Interim Staff Rule 11.2.02(a). As a matter of fact, no such request for review was made within two months from 5 September 2016. A request for review was first made by the complainant on 20 February 2017, and it was followed by an appeal lodged with the Appeals Council on 23 April 2017. The Appeals Council did not consider the appeal on its merits because it concluded, in a report dated 27 August 2018, that Interim Staff Rule 11.2.02(a) had not been complied with and, at least implicitly, that the appeal was irreceivable, and recommended that it be dismissed. By letter dated 28 September 2018, the Director-General made a final administrative decision rejecting the complainant's formal complaint of harassment based, *inter alia*, on the conclusion of the Appeals Council about the effect of the complainant's non-compliance with Interim Staff Rule 11.2.02(a). The complainant impugns before the Tribunal the decision of 28 September 2018.

3. In these proceedings, the OPCW continues to argue in its reply that the complainant was required, by Interim Staff Rule 11.2.02(a), to seek a review within two months and, as a matter of fact, the complainant did not do so. This, the OPCW argues, has the legal consequence that the complaint is irreceivable. The OPCW refers to Judgment 4054, consideration 4, which establishes that a complaint is not receivable in circumstances where internal means of redress have not been exhausted and this will include circumstances in which mandatory time limits in the internal appeal process have not been complied with by a complainant, at least if the obligation to comply with such mandatory time limits has not been waived.

4. The complainant did not file a rejoinder and thus did not challenge the OPCW's arguments concerning the construction of Interim Staff Rule 11.2.02(a), its effect on the internal appeal process, and the effect of non-compliance with internal time limits in proceedings before the Tribunal. It can be assumed, subject to the following two considerations, that because the complainant did not join the issue on these matters, they are not contentious. In any event, the OPCW's arguments are correct.

5. However the complainant did anticipate arguments about receivability in his brief. Two arguments are advanced by the complainant. The first is based on the fact that at the time the decision was made on 5 September 2016 rejecting his formal harassment complaint, there was, on foot, an unresolved request that the investigation be suspended pending the determination of an appeal by the complainant, lodged on 22 August 2016, about the individuals appointed to act as investigators. The complainant argues that the “[r]equest for suspension on 22 August 2016 had the implicit but definitive effect of suspending the deadline for filing an [a]ppeal of the [d]ecision on [the] [h]arassment [c]omplaint issued on 5 September 2016”. It could not have had this effect. It is not a consequence provided for, expressly or impliedly, by the rules. The complainant’s first argument concerning receivability is therefore unfounded and should be rejected.

6. The second argument involves the exercise of the power of the Appeals Council under Interim Staff Rule 11.2.03(f) to waive the time limit imposed by Interim Staff Rule 11.2.02(a). It is expressed in the complainant’s brief as a request to the Appeals Council, notwithstanding that the Appeals Council’s powers and functions have been spent as a consequence of it making its report and recommendation on 27 August 2018. It is not open to the Tribunal to exercise the power as if it was the Appeals Council. Accordingly, the complainant’s second argument concerning receivability is unfounded and should be rejected.

7. It should be noted that the complainant suggests he would have been prejudiced by advice he said he received from the OPCW that his challenges to the appointment of the investigators did not involve a reviewable administrative decision and thus, it is said, he waived the right to file a complaint before the Tribunal in relation to the decision concerning the manner in which the investigation was proceeding. The submission fails to recognise that a decision concerning the composition of an investigating panel is not a final administrative decision amenable to review by the Tribunal but merely a step in the process leading to a final administrative decision and may, as such, be challenged before the Tribunal only in the context of a complaint impugning the final decision (see, for example, Judgment 4131, consideration 4).

8. Accordingly, the Tribunal concludes that the complainant has not exhausted the internal means of redress, as required by Article VII, paragraph 1, of its Statute, and thus his complaint is irreceivable. It will, on this basis, be dismissed.

DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 2 July 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ