

EIGHTY-SEVENTH SESSION

In re Banda

Judgment 1872

The Administrative Tribunal,

Considering the complaint filed by Mr Chemuta Divy Banda against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 3 June 1998, the OPCW's reply of 10 September, the complainant's rejoinder of 16 November and the Organisation's surrejoinder of 15 December 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. The complainant, a citizen of Cameroon who was born in 1946, joined the Provisional Technical Secretariat of the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons in August 1993 as head of the Personnel Branch on a one-year fixed-term appointment at grade P.5. His appointment was renewed several times until 23 May 1997 when the Preparatory Commission ceased to exist and its powers were transferred to the Organisation for the Prohibition of Chemical Weapons. As from 24 May 1997 he was on a three-year fixed-term appointment as head of the Organisation's Human Resources Branch. His probationary period was waived.

The protection of confidential information in the Organisation is dealt with in an annex to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Article 9 of the annex says:

"The staff shall enter into individual secrecy agreements with the Technical Secretariat covering their period of employment and a period of five years after it is terminated."

On 22 July 1997 the Director-General realised that some eighty members of the staff had not yet signed their individual secrecy agreements. He concluded that three staff members, one of whom was the complainant, were to blame for what he deemed to be a serious breach of the "confidentiality annex". On the very same day he told the complainant that he was placing him, with immediate effect, on special leave with full pay for the duration of the procedure concerning termination of employment for unsatisfactory services that he envisaged commencing in accordance with Interim Staff Regulation 9.1. The Regulation reads as follows:

(a) The Director-General may terminate the appointment of a staff member prior to the expiration date of his/her contract if ... the services of the individual concerned prove unsatisfactory; ...

(b) No termination under sub-paragraph (a) shall take place until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Director-General."

The complainant asked the Director-General several times to reconsider his decision.

The complainant was due for a within-step increment on 1 August 1997, but the Deputy Director-General decided to withhold it. In its report of 29 September 1997 the Special Advisory Board, having considered his service with both the Preparatory Commission until 23 May 1997 and the Organisation thereafter, unanimously recommended dismissing the complainant. The Joint Advisory Board sent that report to the Director-General on 3 October, indicating that it endorsed the conclusions of the Special Advisory Board, and emphasising that the complainant had not taken timely measures to secure staff signatures on the secrecy agreements. On 9 October the Director-General in his role as Acting Director-General sent to the complainant a copy of the report. In a letter of 16 October 1997 the Deputy Director-General in his role as Acting Director-General informed him that his appointment was to be terminated for unsatisfactory services after the statutory sixty days' notice.

By a letter of 21 November the Director-General rejected the complainant's request of 29 October for a review of that decision. On 4 December 1997 the complainant lodged his appeal with the Appeals Council. In its report of 11 March 1998 the Council considered that the evaluation of the complainant's performance should be based only on the period of service with the Organisation and not on his services with the Preparatory Commission. It concluded that he did not have enough time, between 24 May and 22 July 1997, to show improvement in his performance, particularly as he was on leave from 26 June to 13 July. It unanimously recommended that the Director-General uphold his decision to suspend the step increment but rescind the decision to dismiss him. Instead of reinstating the complainant it further recommended offering him an appropriate settlement in compensation for the premature termination of his contract. By a letter of 19 March 1998 - the impugned decision - the Director-General confirmed his dismissal.

B. The complainant submits that the impugned decision shows four procedural flaws. First, it does not give the reasons for his termination. The "incident" of the secrecy agreements was not a valid reason for termination for unsatisfactory services. Second, the report on his performance for the period 1996-97 was never completed, and in the previous reports, covering the years 1993-96, he had been given overall ratings ranging from "satisfactory" to "very good". Besides, he was taken on by the Organisation without a probationary period. Third, he was given no warning that his services were unsatisfactory. Fourth, the decision to dismiss him was taken not by the Director-General, who has sole authority for such decisions, but by the Deputy Director-General, who was the "main instigator" of the accusations against him.

The complainant further contends that the Organisation produced no evidence that his services were unsatisfactory. In any event, it would have only been possible to terminate his appointment on that ground as a last resort, if his performance was found to be unsatisfactory in two consecutive reports. Lastly, several conclusions of the Special Advisory Board were erroneous.

He asks the Tribunal: (a) to quash the impugned decision; (b) to order the payment of his step increment as from 1 August 1997 plus an allowance for inflation and interest; (c) to order the payment of his salary and all other allowances to which he would have been entitled had he not been dismissed, plus an allowance for inflation and interest; (d) to order his reinstatement retroactively from 17 December 1997 or alternatively, to award him damages equivalent to the salary and allowances to which he would have been entitled had he not been dismissed, plus an allowance for inflation and interest, as from the date of the Tribunal's judgment until 23 May 2000, the expiry date of his contract; (e) to order the reimbursement of all the expenses which he has, or will, incur as a result of the termination, plus interest; and (f) to award him 20,000 Dutch guilders in compensation for moral injury.

C. The Organisation replies that he was given the reasons for his dismissal first orally by the Director-General on 22 July 1997, and later in detail in the report of the Special Advisory Board, of which he received a copy on 9 October. It submits that the Appeals Council made a mistake of law by failing to take account of the complainant's period of service with the Preparatory Commission. If his entire period of service, from August 1993 to July 1997, is considered it is plain that he was unable to maintain good working relations and that the accusation of unsatisfactory services was based on a series of incidents. His attention was drawn in November 1996 to the issue of the signing of secrecy agreements and in March 1997 to the unsatisfactory performance of his services.

It points out that protection of the confidentiality of information is of crucial importance to member States and that the complainant's omissions impaired the Organisation's credibility. The Deputy Director-General acted under proper delegation of authority when he notified the termination to the complainant on 16 October 1997. Lastly, decisions on a staff member's performance are discretionary and subject only to limited review.

D. In his rejoinder the complainant maintains that the only reason for termination given orally by the Director-General on 22 July 1997 was the matter of the secrecy agreements, and that sending him the report of the Special Advisory Board did not remedy the initial omission. He points out that in November 1996 the Legal Division had not finished drafting the individual secrecy agreements. The memorandum of March 1997 which the Organisation relies on to show that it did comment on his work contains no warning about a possible dismissal. He may have had disagreements about professional matters with colleagues, but that does not mean that he is incapable of maintaining good working relationships. He states that he has been used as a "scapegoat".

He submits that the secrecy agreements were not necessary to guarantee the confidentiality of information, since they merely repeat an obligation already set in Regulation 1.6 of the Interim Staff Regulations. Lastly, he objects to the way that the Organisation treated him during the appeal procedure. He reiterates and enlarges on his claims, and

points out that the expenses claimed as redress under e) include legal costs.

E. In its surrejoinder the Organisation contends that it had a duty to assess the performance of staff particularly those who, like the complainant, had been exempted from probation, because the transition from the Preparatory Commission to the OPCW was driven by political considerations in which issues of geographical balance in staffing and continuity were given greater importance than performance.

The complainant was properly informed of the reasons for his dismissal and the report of the Special Advisory Board was an integral part of the notice of termination. The Human Resources Branch, not the Legal Division, was responsible for drafting the secrecy agreements. Lastly, it treated the complainant properly throughout the period of his special leave.

CONSIDERATIONS

1. The complainant, a citizen of Cameroon, joined the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons (OPCW) on 1 August 1993 and, as head of the Personnel Branch, was awarded fixed-term contracts which were renewed until 23 May 1997, when the Preparatory Commission ceased to exist and its powers were transferred to the Organisation which had just been established. The complainant was awarded a three-year contract as head of the Human Resources Branch with the Organisation, which took effect on 24 May 1997. However, on 22 July 1997, the Director-General realised that some eighty members of the staff had not signed the individual secrecy agreements to which they were obliged to adhere. He attributed the blame for this omission to the complainant and two other staff members. The complainant was immediately suspended and a procedure was commenced for termination of employment for unsatisfactory services. His case was examined by the Special Advisory Board, which transmitted its recommendations through the Joint Advisory Board to the Director-General. On 16 October 1997, the decision was made to terminate the complainant's contract after the sixty days' notice. The complainant appealed against this decision to the Appeals Council of the Organisation, which unanimously recommended that the Director-General reverse his decision. However, this recommendation was not accepted and the decision to terminate his contract was confirmed by a letter of 19 March 1998. The complainant asks the Tribunal to quash the decision confirming the termination of his appointment and to order the Organisation to award him the step increment to which he considers he is entitled, to pay him the remuneration to which he is entitled as from 17 December 1997, to reinstate him or to award him damages equivalent to the salary and allowances to which he would have been entitled until the date of expiration of his contract, and to pay him compensation under various heads, including the moral prejudice which he says he suffered, and costs.

2. In support of his complaint, he has the following pleas: in the first place, he says that the decision to terminate his contract is tainted with serious procedural flaws. The statement of reasons for the decision was inadequate and the decision was taken as a sanction for alleged unsatisfactory services which cannot be demonstrated in the absence of a performance appraisal report for the year 1996-97. Furthermore, the decision was not preceded by the warning that case law deems necessary before any termination of employment for unsatisfactory services. The decision was not signed by the proper authority, but by someone who was prejudiced against him. In the second place, and on the merits, the complainant states that the Organisation has not discharged its burden of proving that his services were unsatisfactory and has not taken into account essential aspects of the case.

3. Before examining these pleas, it is necessary to consider the conflicting reasons for which the Special Advisory Board recommended that the Director-General should terminate the complainant's contract and the Appeals Council recommended that he reverse his decision. It is also necessary to recall the more mitigated position of the Joint Advisory Board.

4. For the Special Advisory Board, which held no less than twelve meetings on this case, the complainant's full career, both in the Preparatory Commission and in his functions as head of the Organisation's Human Resources Branch, show that his performance has been unsatisfactory. With regard to his work before 24 May 1997, the Board emphasises his unsatisfactory performance as secretary to the various bodies of the Preparatory Commission and the fact that he did not play the active role that was to be expected of him in the drafting of the Staff Regulations and Rules. As regards his work following the establishment of the OPCW, the Board notes that there were unacceptable delays in the signing of the individual secrecy agreements which endangered the confidentiality policy of the Organisation, that there was no strategy for the signing of staff employment contracts, and that the oaths of service for staff members joining OPCW from the Provisional Technical Secretariat were neglected. More generally, the Board emphasises the poor relations of the complainant with his subordinates throughout his career,

and the fact that he had not developed any written procedures on how to deal with personnel problems, and had let the personnel databases become out of date, with the result that the staff member who succeeded him after his suspension found no written procedures or electronic files which could be used to deal with the issues which arose. Under these circumstances, the Board reached the conclusion that maintaining the complainant in his functions was "not in the best interests of the Organisation".

5. When it examined the case, the Appeals Council was of a radically different opinion. It noted that, according to the representative of the Director-General, neither the Technical Secretariat nor the Director-General could be held legally responsible for activities in the area of administration that were carried out by the Preparatory Commission and that, consequently, the impugned decision to terminate the complainant's appointment could only relate to his service for the Organisation itself, that is to the period from 24 May to 22 July 1997 inclusive. In the opinion of the Appeals Council, all matters relating to the performance of the complainant for the Preparatory Commission should be excluded from the consideration of the case. Indeed, the complainant was awarded a contract for three years without a probationary period on 24 May 1997 and was on regular leave between 26 June and 13 July 1997. Moreover, he was not warned in due time that his services as head of the Human Resources Branch of the Organisation were not considered satisfactory. With the exception of an electronic mail of 22 July from the Director of the Administration Division, only an internal memorandum from the same Director, of which he became aware on his return from leave, brought precise criticisms to his attention. Therefore the complainant was not given a reasonable time to show improvement in his performance and, even if the Organisation may have been able to criticise his services as being unsatisfactory between 24 May and 22 July, it could not terminate his three-year contract without allowing him sufficient time to improve his performance.

6. Between these two extreme opinions, the Joint Advisory Board, which was responsible for transmitting to the Director-General the opinion of the Special Advisory Board, adopted an intermediary position. Although clearly concurring with the opinion of the Special Advisory Board, the Joint Advisory Board specified that, in its view, the primary consideration which should be taken into account by the Director-General was the fact that the complainant had not taken timely measures for the signing of the individual secrecy agreements, which endangered the Organisation's policy on this matter.

7. In view of the above, it is important to establish the real reasons for which the impugned decision was taken. In this regard, the complainant rightly recalls that international officials have the right to be informed, from the beginning of the procedure, of the grounds which will serve as a basis for the Administration's decision; and he is correct to emphasise that the Director-General's Administrative Directive (OPCW-TS/AD/2) of 22 July 1997 provides that, when the Director-General decides to terminate an appointment, the staff member concerned shall be given in the notice of termination "the reasons for the Director-General's decision and the considerations, conclusions and recommendations of the special advisory board". In the material case, the decision taken on 16 October 1997 by the Deputy Director-General, acting on behalf of the Director-General in the latter's absence, does not provide detailed reasons: it notifies the complainant of the decision to terminate his appointment, while assuring him that the decision was taken "after careful consideration of all the facts, taking into account the recommendations of the Special Advisory Board established to consider this matter, and of the Joint Advisory Board." On the one hand, this decision is not based on reasoning which stands alone and, on the other hand, it refers to the recommendations of two advisory bodies which, without being contradictory, are not entirely concordant, since one invokes the whole career of the complainant for both the Preparatory Commission and the Organisation itself, while the other bases its opinion essentially on the incidents relating to the individual secrecy agreements which resulted in the complainant's suspension. Therefore, the impugned decision is tainted by a flaw which cannot be attenuated by the fact that the complainant was informed on 22 July 1997 of the reasons for which the Organisation had set in motion the procedure for the termination of his appointment.

8. In practice, this procedural flaw reveals an ambiguity in the Administration's position. Because it did not have recourse to a disciplinary procedure, which would not have been inconceivable in the present case, the Organisation constantly hesitated between challenging the complainant's professional capacities throughout his career since 1993 and criticising his performance as from 24 May 1997. However, even supposing that his performance for the Preparatory Commission could legally have been taken into account, the written submissions, and in particular the performance appraisal reports of 1 September 1994, 31 July 1995 and 31 July 1996, shows that, despite certain serious criticisms, the overall appraisals of the complainant's performance were never "unsatisfactory" and that, for the period July 1994 to July 1995, they were even "very good". As a result of these reports, and in accordance with their conclusions, the complainant's contract was renewed each year with a step increment. Moreover, at the time that the Organisation itself was established, he was awarded a three-year contract

without a probationary period. Up to 24 May 1997, the complainant's performance for the Organisation's predecessor body was therefore considered to be satisfactory, even though certain incidents had been noted.

9. It must therefore be deduced from the above that, as indicated by the Joint Advisory Board, it was the performance of the complainant from 24 May 1997 which was taken into account by the Director-General. Serious malfunctioning problems were rightly noted. However, since the procedure that was instigated was not a disciplinary one, but a procedure for the termination of the complainant's appointment for unsatisfactory service, the complainant needed to be informed in due time, either through a negative performance appraisal report, or through precise warnings, that the Organisation was not satisfied with his performance and that if he did not improve it his appointment would be terminated: see, for example, Judgment 1484 (*in re* Thuillier). But the performance appraisal report for the period 1996-97 was never completed and the only criticisms concerning unsatisfactory service which could be levelled against him, which related to the signing of contracts of employment and individual secrecy agreements, were made on 22 July 1997, the very day of his suspension. On that date, no further opportunity was available to him to show that he was capable of improving his performance. On this point, the Organisation can admittedly invoke the internal memorandum sent by the Director of the Administration Division on 1 July 1997 to the complainant, who became aware of it on his return from leave on 13 July. Although the general tone of the memorandum was critical, it did not contain any warning permitting the complainant to believe that his professional competence was being challenged less than two months after his appointment for three years.

10. As a result of the above considerations, without it being necessary to examine the other pleas put forward in the complaint, the impugned decision must be set aside because it did not provide the complainant with the guarantees that are due to international officials threatened with the termination of their appointment for unsatisfactory service. The Tribunal considers that, in the material case, there is no reason to order the reinstatement of the complainant, nor to set aside the decision to withhold a step increment as of 1 August 1997. The prejudice suffered by the complainant due to the unlawful termination of his appointment will be made up by the payment of compensation equivalent to the salary and various benefits that he would have received from the date of the termination of his appointment until the expiration of his contract, namely up to 23 May 2000. This compensation, including full interest up to the date of the present Judgment, will provide compensation for all the material and moral injury claimed by the complainant.

11. The complainant is entitled to the payment of 6,000 euros in costs.

DECISION

For the above reasons,

1. The decision of the Director-General of the OPCW, dated 16 October 1997 and confirmed on 19 March 1998, is set aside.
2. The Organisation shall pay the complainant an amount equal to the salary and benefits that he would have received had he remained in service at his grade and step between the date of the termination of his appointment and 23 May 2000.
3. The Organisation shall pay the complainant 6,000 Euros in costs.
4. The other claims are dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

