

NINETY-SECOND SESSION

In re Bruce

Judgment No. 2096

The Administrative Tribunal,

Considering the complaint filed by Mrs Riitta Pia Kaarina Bruce against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 18 October 2000 and corrected on 29 November 2000, the Organisation's reply of 8 March 2001, the complainant's rejoinder of 6 June and the OPCW's surrejoinder of 4 September 2001;

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, who is of Finnish nationality and was born in 1959, joined the Provisional Technical Secretariat of the Preparatory Commission for the OPCW on 3 October 1994. She was recruited as Head of Laboratory in the Verification Division at grade P-4 on a one-year fixed-term contract. The contract was renewed twice. On 23 May 1997 the OPCW took over from the Preparatory Commission. It granted the complainant a three-year fixed-term contract starting on 24 May 1997.

By an Information Circular dated 23 April 1998, the Director-General informed staff members with fixed-term contracts that he intended to extend their appointments by two years provided that they met the high standards of efficiency, competence and integrity required. His final decision would be based first and foremost on the performance appraisals of the staff members.

During the month of August 1999, the complainant's direct supervisor asked her whether she would be interested in a contract renewal, and she indicated that she would. On 24 August she was informed orally that the Director-General was not satisfied with the performance of the laboratory, that she would be replaced by a staff member at grade P-5 and that her contract would not be renewed. In view of the expiry of her contract, two posts were proposed to her. In an e-mail dated 31 August, the Director-General announced to the management the decisions that he had taken for the reorganisation of the laboratory.

The complainant was transferred to a post in the External Relations Division at grade P-4 in September 1999, particularly to coordinate the OPCW's website. The Contract Renewal Board met on 20 September and 5 October 1999 to review all renewals of fixed-term contracts expiring in 2000. Considering that the complainant's performance was below the standard required, it recommended that her contract should not be renewed. On 6 October 1999 the Director-General informed her in writing that her contract would not be renewed. In a communication of 3 December 1999, the complainant requested him to review his decision. He replied on 14 December 1999 that he could not accede to her request.

On 14 January 2000 the complainant appealed to the Appeals Council, which submitted its report to the Director-General on 6 July. The panel considered that the OPCW had not provided the complainant the opportunity to improve and that she had been given legitimate expectations that her contract would be renewed. It made a majority recommendation to pay her financial compensation equivalent to one year's salary. By a communication of 24 July 2000, which is the impugned decision, the Director-General informed the complainant that he did not accept this recommendation and that he was therefore upholding his decision not to renew her contract.

B. Citing the Tribunal's case law, the complainant acknowledges that decisions concerning contract renewals are within the discretion of an organisation, but asserts that such decision cannot be taken arbitrarily.

The complainant alleges procedural flaws. Firstly, she refers to the page of the minutes containing both the Contract Renewal Board's recommendation and the Director-General's decision on her case; she says it is clear from that document that the OPCW did not comply with the Administrative Directive of 20 September 1999 establishing the Board, and particularly the rules respecting its composition. She contends that the Director of her division did not attend the Board's meeting. Secondly, she emphasises that her last performance appraisal report was not submitted to the Board, as it had not yet been completed. The Board did not therefore take all the relevant documents into account in its decision.

Furthermore, she says that the OPCW did not comply with the obligation to give reasons for its decision not to renew her contract. The only reason proffered was that the quality of her performance was below the standard required. The complainant says that this reason is in total contradiction with the assessments by her supervisors in her performance appraisal reports, both with regard to her former duties as Head of Laboratory and her subsequent work.

With reference to the Information Circular of 23 April 1998 and her interview in August 1999 with her direct supervisor, the complainant contends that the OPCW gave her legitimate expectations that her contract would be renewed. Moreover, the OPCW did not respect the principle of good faith: if the Director-General was not satisfied with her performance, he should have spelled out his criticisms, indicated how she could improve her performance and given her time to make up for her deficiencies.

The complainant asks the Tribunal to set aside the impugned decision and order her reinstatement, or, subsidiarily, payment of a sum equivalent to two years' gross salary plus allowances as compensation for material injury. She also claims compensation for moral injury, and costs.

C. In its reply the OPCW denies that the procedure was flawed. In the first place, the composition of the Contract Renewal Board was lawful. The OPCW produces the summary minutes of the Board's meeting, showing that all the members were present. It adds that the Board based its decision on all the relevant documents, and the applicable rules did not compel the OPCW to accelerate the complainant's performance appraisal procedure with a view to the examination of her case. Furthermore, even if her last performance appraisal report had been available, the Board's decision would not have been different: in view of the inefficiency of the laboratory, it was important to evaluate the complainant's actions, rather than to examine her performance appraisal reports.

Citing the Tribunal's case law, the OPCW asserts that it is not an absolute principle that reasons must be given for an unfavourable decision. In the present case, it considers that although it might have been appropriate to give reasons in the letter of 6 October 1999 for the decision not to renew the contract, the Organisation was not obliged to do so because the complainant had already been informed orally on 24 August and in writing on 31 August 1999. Detailed reasons were also made known to her during the internal appeal procedure. The general assessments contained in her performance appraisal reports should in principle have ensured the renewal of her contract. However, her performance at a professional level was not beyond reproach. In view of the "serious malfunctioning" of the laboratory, it was the responsibility of the Director-General, in his capacity as Head of the Administration, to take measures in the interest of the OPCW. His decision was not therefore in any way arbitrary.

The conversation between the complainant and her supervisor in August 1999 has to be placed in the context in which it occurred, as it was only a question of ascertaining the complainant's intentions. The OPCW contends that the principle of good faith was respected and that the complainant suffered no moral injury. It points out that the post occupied by the complainant was abolished after the expiry of her contract as there was no budgetary allocation for it.

Lastly, the OPCW asks the Tribunal to order the complainant to pay costs.

D. In her rejoinder the complainant argues that the OPCW, which is hard put to defend the lawfulness of the impugned decision, has continued to misrepresent the facts and to discredit her very good performance.

She asserts that the summary minutes produced by the OPCW are of no value as evidence, particularly since they are not dated. The OPCW's arguments concerning the composition of the Contract Renewal Board must be

disregarded as there is no evidence that the Director of the Division to which she belonged was actually present when her case was examined. She adds that the OPCW, which does not deny the Board's general obligation to take into account the performance appraisal reports of staff members, cannot argue that it did not have to examine her last report merely because it was not ready. She says that the OPCW's internal problems cannot be used to justify the breach of an obligation. Basing herself on the case law, the complainant contends that it is a fundamental obligation of an organisation to examine the performance appraisal reports of staff members before taking the decision not to renew their contracts.

The complainant, arguing that she was wrongly held responsible for the inefficiency of the laboratory, says that she was used as a scapegoat. She emphasises that the OPCW admitted, at least implicitly, that the Information Circular of 23 April 1998 created a legitimate expectation of contract renewal for staff members meeting the high standards of efficiency, competence and integrity required.

E. In its surrejoinder the OPCW presses its pleas. It argues that the complainant was not held responsible on her own for the malfunctioning of the laboratory, and points out that the contracts of her direct supervisor and the Director of the Division to which she belonged were not renewed either. It presses its counterclaim for costs.

CONSIDERATIONS

1. The complainant, who was employed by the OPCW as Head of Laboratory at grade P-4, had a three-year fixed-term contract from 24 May 1997.

2. In an Information Circular of 23 April 1998, the Director-General informed staff members with fixed-term contracts of his intention to extend their appointments, initially granted for three years, by a further two years provided that they had fully demonstrated that they met the high standards of efficiency, competence and integrity required.

On 24 August 1999 the complainant was informed orally that the Director-General was not satisfied with the performance of the laboratory, that she would be replaced by a staff member at grade P-5, and that her contract would not be renewed; she would have the choice of two posts until her contract expired.

The Director-General informed the management on 31 August of the decisions he had taken for the reorganisation of the laboratory.

In accordance with the choice that she had made, on 8 September the complainant was transferred to the External Relations Division, mainly to coordinate the OPCW's website.

On 20 September the Contract Renewal Board recommended that her contract should not be renewed on the grounds that her performance was below the standard required. The Director-General accepted this recommendation and informed the complainant by a letter of 6 October that her contract would not be renewed.

3. In a letter of 3 December 1999 the complainant requested the Director-General to review his decision. That request was refused in a reply of 14 December.

On 14 January 2000 she lodged an appeal with the Appeals Council, which issued its report on 6 July. The panel considered that the OPCW had failed to give the complainant a clear warning to allow her time to improve and that it had given her legitimate expectations that her contract would be renewed. Considering that reinstatement could not be envisaged, the panel made a majority recommendation to the Director-General to grant the complainant financial compensation equivalent to one year's salary. In a dissenting opinion one member of the Appeals Council nevertheless considered that the OPCW could have decided to reinstate her and that the financial compensation to be granted should be equivalent to two years' salary.

By a letter of 24 July 2000, the Director-General informed the complainant that he rejected the panel's recommendation and was upholding his decision not to renew her contract. This is the decision that is being impugned.

4. The complainant asks the Tribunal to set aside the impugned decision and to grant full redress, namely to order

her reinstatement or, subsidiarily, the payment of a sum equivalent to two years' gross salary plus allowances as compensation for material injury. She also claims moral damages and costs.

In support of her claims, the complainant has four pleas. She alleges procedural flaws, breach of the obligation to give good reason for a decision not to renew a contract, non-compliance with her legitimate expectations that her contract would be renewed and failure to observe the principle of good faith.

5. Consistent precedent has it that an international organisation has broad discretion in deciding not to renew a fixed-term contract. The Tribunal may exercise only a limited power of review over such a decision and will quash it only if it shows a mistake of fact or law, or a formal or procedural flaw, or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority or lack of authority by the person taking the decision (see Judgment 2007, *in re* Diouf, under 7).

The claims will therefore be examined on the basis of these criteria, as developed by the Tribunal.

6. As procedural flaws, the complainant contends that the Contract Renewal Board was not properly constituted and that it did not take into account all the relevant documents when examining her case.

Composition of the Contract Renewal Board

7. The complainant argues that the OPCW did not comply with the Administrative Directive of 20 September 1999 - bearing the reference OPCW-TS/AD/33 - which established the Contract Renewal Board under Interim Staff Rule 4.3.01 and determines the composition and procedural rules of the Board.

In September 1999, Rule 4.3.01 provided that:

"The appointment, contract renewal and promotion of staff members shall be reviewed by (an) appointment board(s). The terms of reference and composition of the appointment board(s) will be set out in an Administrative Directive."

Paragraph 2.1 of the above Administrative Directive provides that:

"The [Contract Renewal] Board shall review all cases of contract renewals for staff members on fixed-term contracts."

Paragraph 3.1 of the directive states that:

"The Board shall consist of the following:

Chairperson: the Director-General;

Members:

(a) the Deputy Director-General;

(b) the Chairperson of the Staff Association;

(c) the Director of the Division or Office to which the post belongs;

(d) the Legal Adviser; and

(e) one other Director appointed by the Director-General, either on an ad hoc basis or for a specific period of time."

8. The complainant argues that the page of the minutes of the Contract Renewal Board's meeting that she produced with her complaint does not show that the Director of her division was present during the examination of her case. She says that the Board's recommendation was therefore tainted by a procedural flaw, which was all the more serious as the person best placed to give an appraisal of her performance did not attend the meeting.

The OPCW denies that there were procedural flaws and produces a document headed "summary minutes", proving that all the members of the Board were present during the examination of the complainant's case.

The OPCW states that the Director of the Division to which the complainant belonged was indeed present during the discussion of her case. The fact that his signature does not appear on the extract of the minutes produced by the complainant is simply because the minutes were only signed by the permanent members of the Board. They were the only ones to be present at the examination of all the cases and they therefore bore witness to the accuracy of the minutes as a whole. The other directors, who only attended meetings during the examination of the cases of staff members under their authority, did not sign the minutes.

9. The complainant is right to conclude that the summary minutes produced by the OPCW do not prove the presence, during the examination of her case, of the Director of the Division to which she belonged. Even though this document indicates that each case was considered on the basis of a "recommendation by the Director of the Division or Office to which the post belongs" (a recommendation may be made in writing) and that all the Board Members were present, nowhere is it mentioned that the Director of the Division to which the complainant belonged was present, and his name is not among those of the Board members who signed the summary minutes.

The OPCW endeavours to justify the absence of a signature by the Director of the Division on the summary minutes by means of a distinction, which is not made in the Administrative Directive, between permanent members who had to sign the minutes and others who did not. But the conclusion must be that the OPCW, upon which the burden of proof rests, has not produced evidence that the Director of the Division to which the complainant belonged was present during the examination of her case.

The complainant is therefore correct in asserting that there was a procedural flaw, as the OPCW has provided no proof that the Contract Renewal Board was properly constituted.

Failure of the Contract Renewal Board to take into account all the relevant documents.

10. The complainant claims that the rules set out in the Administrative Directive of 20 September 1999 were not met, firstly, because the Contract Renewal Board did not take into account her performance appraisal report for 1999, which should have been prepared with a view to the examination of her case by the Board and, secondly, because a recommendation by the Director of her division was not among the documents submitted to the Board.

11. With regard to the alleged non-compliance with the obligation to take into account her performance appraisal report, the complainant points out that paragraph 2.2 of the Administrative Directive of 20 September 1999 provides that:

"... the [Contract Renewal] Board shall apply the criteria contained in the Chemical Weapons Convention, the OPCW Staff Regulations and Rules, and relevant administrative directives. Performance and conduct will be evaluated first and foremost on the basis of documents available in the staff member's personnel file."

She adds that, from this point of view, the relevant provision is Regulation 4.4(a) of the OPCW Staff Regulations, which states that a contract extension shall be assessed "upon, inter alia, the staff member's performance measured in accordance with a rigorous performance appraisal system". The Director-General's Information Circular of 23 April 1998 confirms the obligation to take into account "first and foremost" the performance appraisal reports of a staff member in determining whether he or she meets the high standards of efficiency, competence and integrity required.

12. In its reply the OPCW submits that the Contract Renewal Board examined all the required performance appraisal reports. It points out that these reports are drawn up each year, in the complainant's case in October. Even if the 1999 performance appraisal report had been completed strictly within the time limits, it could not have been submitted to the Board for examination on the merits on 20 September 1999. Moreover, the Administrative Directive determining the Board's procedure did not require the usual appraisal process to be accelerated with a view to the examination of a case.

Lastly, the OPCW contends that, even if the complainant's performance appraisal report for 1999 had been available to the Board, the outcome of its examination of her case would not have been changed. The appraisal of the complainant's overall performance, which was rated as "good" in this report, is in line with the ratings "good" and "very good" in the reports for the years 1994 to 1998. According to the OPCW, the determining factor when examining the possibility of renewing the complainant's contract was not her performance appraisal reports, but

the malfunctioning of the laboratory, of which the Director-General had been informed by an independent source. In his assessment of the three staff members in charge of the laboratory the Director-General placed importance on their professional ability rather than their staff reports.

13. But the Organisation's plea is wrong.

The texts cited above show that the Board was under the obligation to take into account performance appraisal reports. It is also demonstrated that the performance appraisal report for 1999 had not been completed for submission to the Board. Yet before a decision is taken not to renew a contract, precedent has it that it is a fundamental obligation to examine the staff member's performance appraisal. Failure to comply with that obligation constitutes a procedural flaw as it has the effect of excluding an essential fact from consideration (see, in particular, Judgment 1525, *in re Bardi Cevallos*, and the case law cited therein).

The complainant's last performance appraisal report was only available on 23 November 1999, and the Contract Renewal Board's recommendation is dated 20 September 1999. The conclusion is therefore that the complainant's performance appraisal report for 1999 was not taken into account when deciding that her contract would not be renewed and an essential fact was therefore overlooked.

14. The challenged decision is therefore tainted by procedural flaws and must accordingly be set aside, without needing to go into the other arguments and pleas.

15. The complainant seeks her reinstatement, but the Tribunal finds this remedy inappropriate, particularly since the post that she held has been abolished. It is therefore bound to award damages in compensation for the material and moral prejudice arising out of the unlawful decision not to renew her fixed-term contract. Taking into account all the circumstances of the case, and particularly the fact that the complainant was not entitled to the automatic renewal of her contract, the Tribunal sets the compensation due at 40,000 United States dollars.

16. Having succeeded, the complainant is entitled to costs, which are set at 6,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The OPCW shall pay the complainant 40,000 United States dollars in damages under all heads.
3. It shall pay her 6,000 euros in costs.
4. The OPCW's counterclaim is dismissed.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

