Registry's translation, the French text alone being authoritative.

NINETY-SIXTH SESSION

(Applications for execution) **Judgment No. 2284**

The Administrative Tribunal,

Considering the applications for execution of Judgment 2151 filed by Mr T. M. and Mr D. G. M. on 10 March 2003 and corrected on 24 April, the reply of the Organisation for the Prohibition of Chemical Weapons (OPCW) of 5 June, the complainants' rejoinder of 11 July and the Organisation's surrejoinder of 14 August 2003;

Considering the applications to intervene filed by:

V. A. K.

S. A.

A. A.-H.

R.D.J. A.

D.J. B.

P. C.

M. C.I.

M.S. C.

I. C.

R. D.

J.L. G. H.

L. G.

K.J. K.

M. K.

K.S. K.

J. K.

R.E. K.

I. L.

J.H. M.

D.L. M.

S. M.

J.A. O.

S.D. P.

J. P.

B. W.;

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. Part of the facts of this case are set out in Judgment 2151, delivered on 15 July 2002. In that judgment, the Tribunal ordered the OPCW to conduct "a new procedure for classification of the posts [of inspectors at grade P-3] and, in the light of objective considerations made known to the complainants, reach lawful decisions".

In September 2002 the Organisation engaged the consultant responsible for the initial classification to conduct the new procedure. Before he arrived, the complainants were invited to participate in the preparation of new job descriptions. By e-mail dated 1 October, one of the complainants sent the Acting Director of the Inspectorate Division job descriptions for inspectors at grades P-3 and P-4, indicating that the descriptions for the P-3 posts reflected the past and present situation. P-3 inspectors were invited to attend several meetings in October, following which they sent the Administration their comments and requests in memoranda, to which they received no reply. By memorandum of 25 October, the Acting Head of the Human Resources Branch invited 19 P-3 inspectors, including the complainants, to individual interviews with the consultant. The inspectors agreed to attend the interview "without prejudice to [their] rights". They expressed the view that should the exercise "continue to be farcical and an illegal process", as has been the case so far, in their opinion, they would then take the "necessary legal action". On 28 October the Administration issued a form entitled "Request For Classification Action", together with a draft job description, and invited the inspectors concerned to propose changes if they wished. On 31 October the complainants acknowledged receipt of those documents but stated that they could not take part in the exercise. They expressed their astonishment at the fact that the post was already classified at the P-3 level in the form, although the classification exercise had not yet begun. In his report dated 12 November 2002, the consultant confirmed that the posts concerned were to be classified at P-3 level. In a memorandum of 13 January 2003, which constitutes the impugned decision, the Director-General informed the P-3 inspectors that the grade of their posts was maintained.

B. The complainants point out that the Tribunal imposed three conditions on the Organisation when it referred the case back to it: a new procedure for classification of posts was to be conducted; this procedure and the resulting decisions had to be based on "objective considerations made known to the complainants"; and decisions had to be "lawful". In their view, none of these conditions has been met.

Firstly, while a new classification exercise has taken place, it has not been conducted in good faith. Before the exercise had even begun, the Request For Classification Action form already mentioned that the classification had been approved at P-3 level. Furthermore, the consultant's terms of reference had been to study only the posts of P-3 inspectors, thus preventing him from drawing a comparison with the grading of P-4 inspectors, which is the crux of the matter. Yet on the occasion of the initial classification exercise in 1998, the consultant had linked the classification of P-3 and P-4 inspectors, considering that their functions were essentially the same. The Organisation also refused to communicate to the complainants the documents used by the consultant in the course of the initial exercise. If it is true, as the Acting Head of the Human Resources Branch stated, that those documents do not exist since no proper classification of any inspector posts was completed in 1998, it would mean that the Organisation had on the one hand misled the P-3 inspectors at the time of the initial classification exercise, which it knew to be illegal, and on the other hand lied to the Tribunal in its written submissions for the proceedings that culminated in Judgment 2151.

Secondly, the fact that the consultant devised a point rating - which was missing in the previous exercise - is not sufficient to meet the requirement of providing objective considerations. The reliability of a point rating is closely linked with the degree of competence and impartiality of its originator. Yet the Acting Head of the Human Resources Branch had himself considered that the consultant was not competent since he had described the 1998 classification exercise as "a disaster". In addition, the consultant had to review his own previous results, even though this is never easy. Furthermore, the objectivity of a point rating can only be assessed by comparison with that applied to other posts. In the present case, it was agreed by both the consultant and the Organisation that the duties and responsibilities of the posts of P-3 and P-4 inspectors were "essentially the same". The consultant should have presented "objective considerations" warranting different grades for inspector posts.

Thirdly, the impugned decision is illegal since, apart from the reasons already put forward, the Director-General drew clearly false conclusions from the facts. In his report, the consultant refers to "entry level inspector posts", which corresponds neither to the complainants' posts nor to any known classification. The consultant probably had in mind his own initial recommendation that inspectors should be recruited at grade P-3 and then promoted within three years to grade P-4. However, that recommendation had not been implemented by the Organisation, as shown by the complainants' situation, since despite the length of their experience they remain at grade P-3.

The complainants contend that the Organisation's refusal to execute Judgment 2151 limits their career prospects. They feel they have been abused by the Organisation during the whole process and that they have been discriminated against as compared with the P-4 inspectors.

They ask the Tribunal to set aside the impugned decision, to order that their posts be classified at grade P-4 as from 1 January 1999 or to send the case back to the Organisation for a correct execution of Judgment 2151, to order the payment of interest at the rate of 8 per cent a year on any sums due, and to award damages for moral injury and costs.

C. In its reply the defendant maintains that the complainants did not exhaust the internal remedies prior to filing their applications for execution with the Tribunal. It cites Judgment 1887, in which the Tribunal stated that "exhausting all internal remedies is [...] in principle essential when the case is sent back to [the competent] authority to resume or continue the procedure and when the judgment leaves it a degree of discretion".

With regard to the complainants' three pleas, the Organisation argues firstly that in any request for post classification the present level of the post must be identified, which in no way prejudges the outcome of the procedure. As for confining the classification exercise to P-3 inspector posts only, that is precisely what the Tribunal ordered in its Judgment 2151. Lastly, the accusation that the documents used in the 1998 classification exercise were not supplied to the complainants is irreceivable because the above-mentioned judgment carries the authority of *res judicata*. The OPCW emphasises that although the classification exercise generated a considerable amount of litigation (see Judgments 1987, 1988 and 2085), the Tribunal found no fault with the work of the consultant in any of those judgments.

The defendant maintains that, with regard to their second plea, the complainants rely solely on allegations of bias and incompetence on the part of the consultant without offering any proof or showing the slightest defect in his methodology or in the conclusions he reached. It argues that the point rating of the P-3 posts in the new classification is based on the same elements and principles as those used in the point rating of the P-4 posts in the 1998 classification. As noted by the Tribunal in Judgment 2151, according to the OPCW, the fact that the complainants assert that they perform the same functions as P-4 inspectors is not sufficient for granting them that grade. It argues that the consultant was the most appropriate person to correct the errors in the 1998 classification procedure, which he did, and to determine the grade of the complainants' posts.

Lastly, the Organisation considers that the third plea is based entirely on the first two and should therefore fail as well.

It concludes that Judgment 2151 has been correctly executed and points out that the complainants' claim that the Tribunal order the classification of their posts at grade P-4 is contrary to the Tribunal's ruling in Judgement 2151, whereby the latter "will not undertake a job classification exercise, which lies solely within the authority of the defendant". The Tribunal will not interfere in a classification decision except for a limited number of reasons, none of which has been shown to exist in the present case.

D. In their rejoinder the complainants contend that it is clear from the Tribunal's case law that it is not necessary to exhaust internal remedies before filing an application for execution. They point out that in Judgment 1887 cited by the defendant, the Tribunal, "with a view to avoiding a sheer pedantic approach", upheld the receivability of the applications, since the requirement for exhaustion of internal remedies served "no legal purpose".

On the merits, the complainants reiterate their three pleas. Firstly, they point out that the Request For Classification Action referred not to the current grade of the post but to the "approved" grade, that is, the grade obtained further to a classification exercise. In their view, the defendant's argument whereby it was the Tribunal which had confined the review to P-3 inspector posts would mean that the Tribunal was responsible for depriving the new classification procedure of all usefulness, which is completely unfounded. Furthermore, they note that the Organisation did not contest, at the time, their comments concerning the Acting Head of the Human Resources Branch's statements regarding the initial classification procedure. It is probably because it is unable to reconcile those statements with its own position during the proceedings leading to Judgment 2151 that it is trying to divert the Tribunal's attention by referring to other judgments which raise substantially different issues.

Secondly, the complainants give examples which in their view evidence the absence of any objective considerations: the fact that the consultant attributed a different number of points for the "knowledge" requirement of P-3 and P-4 inspectors even though these requirements were identical according to the vacancy notices; the fact that in 2002 he used only one job description for all inspectors, whereas the work varies according to specialities and it is unquestionable that in the 1998 classification separate job descriptions were used for the posts of grade P-4 inspectors; the fact that the job description and the point rating worksheet refer to terms that do not exist; and the fact that the point rating worksheet contains completely false statements. They accuse the consultant of having drafted a job description that was so vague that he could easily classify the posts at grade P-3.

Thirdly, they note that the Organisation remains silent regarding their view that the Director-General drew clearly false conclusions from the facts, and they consider that silence to be implicit recognition of the truth of their argument.

Lastly, they suggest that there is not much to expect from any new classification of their posts and emphasise that the matter is becoming urgent for some inspectors, who will soon be leaving the Organisation because of the non-renewal of their contracts.

E. In its surrejoinder the OPCW reiterates its arguments, particularly regarding the receivability of the applications. It points out that the complainants base their allegations of bad faith on events prior to the delivery of Judgment 2151, which are therefore *res judicata*. It maintains that there is no valid distinction between the "current" grade and the "approved" grade, the latter being understood as the outcome of the previous classification exercise. It contends that the rationale of the different grading given to inspector posts was recognised by the Tribunal in Judgment 2151, when it said that "in the case of inspectors, it is not out of the ordinary for posts at different levels to be differentiated by taking into account objective criteria related to the nature of the functions performed and the experience required to fulfil the respective duties". It disagrees with the complainants' view that it is unable to reconcile the statements by the Acting Head of the Human Resources Branch and its own position during the proceedings that led to the delivery of Judgment 2151, and refers to the arguments put forward in its reply. Lastly, the fact that the complainants did not challenge the classification of certain posts at grade P-4, and that they use those posts as examples to justify their claims, clearly debunks the assertion which they attribute to the Acting Head of the Human Resources Branch, that there was no proper classification of any inspector posts in 1998.

The OPCW also disagrees with each and every assertion made by the complainants in their rejoinder regarding their second plea. It recalls that the Tribunal did not order in Judgment 2151 that the P-3 posts must be reclassified by comparison with the P-4 posts and contends that it is not for the complainants to decide what points ratings should be assigned to the various elements of the job description. It adds that it was legitimate to use a generic job description for all inspector posts, regardless of their speciality, which did not prevent the different disciplines being fully considered by the consultant.

With regard to the third plea, it disagrees with the complainants' assertion that the Director-General has clearly drawn false conclusions from the facts.

CONSIDERATIONS

1. In its Judgment 2151, the Tribunal, at the request of three inspectors at grade P-3 of the OPCW, set aside a decision by the Director-General to maintain the complainants' posts at that grade and referred the case back to the Organisation for a new decision on their request for their posts to be classified at grade P-4. It considered that the classification procedure followed by the defendant was marred by a succession of errors and that while, in the case of inspectors, it was not out of the ordinary for posts at different levels to be differentiated by taking into account objective criteria related to the nature of the functions performed and the experience required to fulfil the respective duties, the evidence available was not sufficient to justify the method followed by the consultant in recommending that the complainants' posts be maintained at grade P-3.

2. When the case was sent back to the Organisation, the latter engaged the consultant who had conducted the classification exercise in 1998, asking him to take account of the considerations contained in Judgment 2151. The inspectors concerned by the new exercise - after discussions during which they expressed their dissatisfaction, particularly in memoranda of 17 and 22 October 2002, at the insufficient and contradictory information they were given and questioned the good faith of the Administration and the consultant - nevertheless agreed to individual interviews with the latter. They then acknowledged receipt of a form entitled "Request For Classification Action", which contained a job description. They considered, however, that they could not take action on the Administration's request for them to propose appropriate changes to the job description. On 12 November 2001 the consultant handed in his report. Having analysed the functions of the inspectors concerned and noted that they considered that there were no differences between their duties and responsibilities and those of their P-4 colleagues, the consultant recommended, in the light of the appropriate International Civil Service Commission (ICSC) Master Standard for the classification of posts, that inspectors be recruited at grade P-3. This recommendation was based in particular on the consultant's discussions with the management of the Inspectorate Division and individual interviews with the inspectors. By a memorandum of 13 January 2003, the Director-General informed those concerned that, in accordance with that recommendation, the classification of their posts at grade P-3 was maintained.

3. Two of the complainants who had previously initiated the proceedings leading to Judgment 2151 have filed an application for execution with the Tribunal, on the grounds that, contrary to the view expressed by the Director-General in a letter to one of them dated 15 January 2003, the procedure followed did not constitute a proper execution of the judgment. The Organisation considers that the application must be dismissed as irreceivable, on the grounds that the complainants have not exhausted internal remedies, and subsidiarily as unfounded.

4. The Tribunal rejects the defendant's plea of irreceivability. As stated in Judgment 1887 delivered on 8 July 1999 the requirement that all internal remedies be exhausted is, in principle, binding on a complainant applying for execution of a judgment where a case has been referred back to an organisation for the latter to resume a procedure. In such a case the judgment leaves the organisation a degree of latitude, but the Tribunal, in order to avoid an overly formalistic approach, will waive that requirement when it serves no legitimate purpose. Such is the case where a matter is ripe for discussion and where the parties have expressed their views on all the points at issue. That is the case here: exhausting internal remedies would merely delay the settlement of a dispute which has already lasted too long, and in which the parties' arguments are well known. It is a case in which there should be an immediate ruling.

5. In arguing that the decision confirming the classification of their post at grade P-3 is illegal and fails to take account of the instructions given in Judgment 2151, the complainants maintain that the Organisation breached the principle of good faith in the new classification exercise, that the classification was not based on "objective considerations made known to the complainants" and that the impugned decision confirms a classification that concerns "entry level inspector posts", a notion which appears neither in their contracts nor in the vacancy notices on the basis of which they were recruited.

6. The complainants question the good faith of the Organisation by referring to documents issued prior to the new classification exercise, which stated "classification level: P-3", as if the decision had already been taken. Similarly, they argue that by confining the classification exercise to grade P-3 inspectors, the Organisation prevented the consultant from drawing a comparison with the functions of P-4 inspectors, which was the crux of the matter. Lastly, the Organisation unlawfully refused to communicate to them the documents used by the consultant in the course of the 1998 classification exercise under the pretence that the documents did not exist.

7. The defendant's counter arguments appear convincing. As the Organisation indicates, the Request For Classification Action, accompanied by a job description on which the inspectors concerned were invited to comment, obviously did not amount to a "decision", which could only be taken once the procedure had been completed. Although it was somewhat clumsily drafted, that document could not be construed as a pre-judgment of the outcome. Similarly, the Organisation cannot be criticised for having confined the exercise to the classification of P-3 inspectors, since that was the subject of the dispute which gave rise to Judgment 2151. To review the classification of P-4 inspectors, which had never been challenged before the Tribunal, would have been unlawful. Lastly, while it is regrettable that the documentation used in 1998 was incomplete and virtually impossible to reconstitute, these errors, which were recognised by the defendant, were highlighted by the Tribunal in its Judgment and partly accounted for the quashing of the original decision. The new exercise undertaken by the consultant took account of all the necessary information, and the Organisation's good faith should be judged on the basis of the elements used in 2002 and not those on which the 1998 classification was based. In the circumstances, bad faith has not been proved and the complainants' criticism in that regard must be rejected.

8. As regards the lack of objectivity and clarity of the criteria used by the consultant, the complainants recognise that the latter used a point rating system based on the ICSC Master Standard, which had not been the case with the previous classification. They consider however that the objectivity of this method is merely apparent. Having conducted the initial classification exercise, the consultant could not be impartial. In addition, there is no objective rationale for the different gradings given to P-3 and P-4 inspectors. In their rejoinder they disagree with the number of points attributed to certain factors in the point rating worksheet, such as "knowledge", and argue that the consultant mistakenly used only one job description for all officials. He also referred to posts which do not exist and used arguments which were "completely false" and not supported by the job descriptions.

9. The Tribunal finds nothing in the evidence to cast any serious doubt on the consultant's impartiality and competence. The methodology he used is clearly explained in his report. It is based partly on consideration of objective standards established by the ICSC and partly on the results of his interviews with the officials concerned and with officials in administrative departments. In a matter as delicate as post classification, the Tribunal, in accordance with consistent precedent, cannot substitute its own assessment for that of the competent authorities. It must in the present case limit its review to ascertaining whether the new classification exercise was conducted according to a methodology that took account of objective and clear elements and was not tainted by errors of fact or of law. The complainants cannot maintain that the consultant's methodology ignored these requirements, nor can they challenge the outcome of the classification by pleas which, if admitted, would cause the Tribunal to substitute its own assessment for that of the competent authority.

10. In the last of their pleas, the complainants argue that the impugned decision is unlawful, partly because the Organisation failed to take due account of Judgment 2151, and partly because the classification recommended by the consultant generally concerns "entry level inspector posts", and not those held by the complainants. Regarding the first of those arguments, it appears from the foregoing considerations that the Organisation complied with the provisions of Judgment 2151 by starting a new classification procedure and by ensuring that the methodology applied was objective and transparent. With regard to the second argument, it is true that the consultant considered that the P-3 grade should apply to "entry level inspector posts", which is not unreasonable, since the Tribunal had stated in its Judgment that "in the case of inspectors, it is not out of the ordinary for posts at different levels to be differentiated by taking into account objective criteria related to the nature of the functions performed and the experience required to fulfil the respective duties" (emphasis added). In any event, the Director-General's decisions challenged in this case do not refer to that notion but merely inform the complainants that their post classification is maintained at the P-3 level.

11. As the claims for the Director-General's decisions to be set aside cannot be accepted, the further claims for the complainants' posts to be classified at the P-4 level as from 1 January 1999, and for the complainants to be compensated for their alleged material and moral injury, must also be dismissed.

Since the applications for execution are dismissed, the applications to intervene must also fail.

DECISION

For the above reasons,

The applications for execution are dismissed as well as are the applications to intervene.

In witness of this judgment, adopted on 13 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

James K. Hugessen

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.