

The Administrative Tribunal,

Considering the complaint filed by Mrs R.M. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 29 January 2003, the Organisation's reply of 20 March, the complainant's rejoinder of 24 June and OPCW's surrejoinder of 4 September 2003;

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

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

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

A. The complainant was born in 1950 and has German nationality. She was recruited in January 1997 under a fixed-term contract at grade P-4 as Head of the Information Evaluation Unit.

In August 1998 she was appointed to the post of Head of the Policy and Review Branch (PRB) in the Verification Division at grade P-5. Following a reclassification exercise concerning all posts in the Organisation her post was upgraded to D-1 and she assumed that grade with retroactive effect from 1 August 1999.

At the end of 2001 it was announced that the Director of the complainant's division was to be replaced by a German national. Fearing that the presence of two officials of the same nationality in line of authority in the Verification Division would be perceived as inappropriate by the States Parties, the Director-General decided to transfer the complainant to the post of Head of the Office of Confidentiality and Security (OCS) in the Division of Special Projects. Although this was a P-5 post, the complainant was to retain her D-1 grade, and hence the corresponding salary and benefits, and the Director-General indicated that he intended to have her new post reclassified as a D-1 post by the Executive Council. The complainant was informed of this by a memorandum of 19 December from the Head of Human Resources and her transfer took effect from 12 December 2001.

In a letter of 5 February 2002 she asked the Director-General to review his decision, explaining that this transfer from a D-1 post to a P-5 post was harmful to her dignity, that the post to which she was transferred did not correspond to her background and qualifications and that the decision constituted misuse of authority, since it was not taken in the best interests of the Organisation. The Director-General maintained his decision, replying in a letter of 28 February 2002 that the transfer was a short-term arrangement "pending a final sorting out of [her] posting". He reiterated his reasons and stated that her concerns were being addressed, but that the reclassification of the post would take time, in view of the procedures involved.

On 20 March 2002 the complainant filed an internal appeal against the decision of 28 February. Two days later the Director-General reversed his decision and transferred the complainant back to the Verification Division. In a memorandum of 22 March to the Director of the Verification Division he wrote:

"I am transferring [the complainant] with immediate effect, [...] back to the Verification Division, to become your Special Assistant or any other position within the Division which, in your consideration, will best utilise [her] expertise."

On 6 May 2002 the complainant submitted a request for review of the decision of 22 March to the Acting Director-General, the Director-General having left the Organisation in April. The Acting Director-General sent no written reply, but he invited the complainant to discuss the matter with him and during their meeting of 17 May he expressed the view that both transfers had been incorrect. He informed the complainant that he wished to transfer her back to the position of Head of OCS on a temporary basis, but the complainant objected and she therefore

remained in the Verification Division.

In June 2002 the complainant's performance appraisal report confirmed that she still had no functional title. On 2 July she filed a second internal appeal, directed at the Director-General's decision of 22 March 2002. Again, she contended that the challenged decision did not respect her dignity and was not in keeping with her qualifications. She also argued that it was flawed by an error of law and that it constituted moral harassment against her.

It was agreed by the parties that the complainant's two appeals should be joined. The Organisation's single reply to the two internal appeals was drafted by the Acting Director-General. Conceding that the complainant was "floating" without specific functional title and that the Organisation had "not acted in its own best interests", he declared that the Organisation would "take the necessary action, as a matter of principle and of good faith, to rectify the situation, to utilise the [complainant's] qualifications and skills in the best interest of the Organisation, and hence restore her dignity, as soon as the opportunity [arose]".

The Appeals Council issued its report on 4 October 2002, recommending in particular that the complainant be reinstated to a position in keeping with her background, qualifications and status within the Organisation. It also recommended an award of 10,000 euros for moral injury.

This report was submitted to the new Director-General, who had taken office on 25 July 2002. By a decision of 4 November 2002, which is the impugned decision, the new Director-General accepted the Council's first recommendation, which he proposed to implement by having the complainant's current post reclassified as a D-1 post. He considered that the Council's finding of moral injury was not fully supported by the evidence, but nevertheless decided to grant her 1,000 euros in "symbolic reparation" for the injury she had suffered.

In January 2003, when the complainant filed her complaint with the Tribunal, her post was still at grade P-5.

B. According to the complainant, the Organisation has committed itself on several occasions to finding an appropriate solution to her situation but has taken no action. Since she is still assigned to a P-5 position, which in her view is not in keeping with her qualifications and previous grade, she considers that the Organisation has breached not only the principle of good faith, but also its obligation to respect the dignity of its staff members and to avoid causing them undue injury or unnecessary hardship.

She challenges the decision of 4 November 2002 on the grounds that it did not fully compensate her for the injury she has suffered. She points out that the Organisation acknowledged that her dignity had been harmed and that the Appeals Council recommended an award of 10,000 euros in respect of that injury. She also refers to the damage to her career prospects resulting from the impugned decision.

She asks the Tribunal to set aside the impugned decision insofar as it does not grant her request, and to award her 5,000 euros per month in moral damages, calculated from December 2001 until such time as she is reinstated in a D-1 position "in keeping with her background, qualifications, position and status within the Organisation". She also claims two years' gross salary in compensation for the damage to her career prospects. Lastly, she claims costs.

C. The Organisation replies that the impugned decision is discretionary in nature and therefore subject to only limited review by the Tribunal. It points out that the complainant's job description, for the post of Special Assistant to the Director of the Verification Division, was finalised on 19 March 2003 and corresponds to that of a D-1 position. As far as the actual reclassification of her post is concerned, since March 2002 the matter has been in the hands of the Executive Council, which has yet to reach a decision.

The Organisation considers that the complainant's dignity has not been harmed: she was duly consulted prior to each transfer and her interests and reputation were carefully safeguarded at all times. Nor did she suffer any financial injury, since her conditions of service remained unchanged. The Organisation takes the view that it has done what is necessary in the short time that has elapsed since the impugned decision, and that it has acted in good faith.

D. In her rejoinder the complainant acknowledges that the filing of her complaint prompted the Organisation to take action, but observes that the job description prepared for her was hastily copied from that of another post and does not correspond to her post. She also asserts that the request for reclassification submitted to the Executive Council likewise concerned a different post and that no such request has been submitted in respect of her current one.

She points out that the post of Special Assistant to the Director of the Verification Division which she now holds was originally at grade P-4. Having been upgraded to P-5 in 1998 as a result of a classification exercise, it was downgraded to P-4 in a subsequent classification exercise which was not implemented. Consequently, she asserts that it cannot seriously be argued that her post is now a D-1 post. In any case, at the time when she submitted her rejoinder, her post still carried grade P-5.

E. In its surrejoinder the Organisation maintains its position on all issues. It contends that the complainant has benefited greatly in her career at the OPCW and more than any other staff member. Moreover, her current degree of responsibility is much greater and her public profile better than in her previous post, and her functions are fully commensurate with her qualifications.

The defendant acknowledges that its first request to the Executive Council for reclassification concerned the complainant's post in OCS, but points out that a request for reclassification has also been submitted to the Executive Council in respect of her current one.

CONSIDERATIONS

1. On 3 August 1998 the complainant was appointed Head of the Policy and Review Branch (PRB) in the Verification Division, at grade P-5, as from 1 August 1998, under a three-year fixed-term contract. Two years later, she was informed that her post was reclassified to grade D-1, retroactively effective from 1 August 1999. On 2 May 2001 the complainant's contract was extended for two years, effective from 1 August 2001. On 7 December 2001 the then Director-General informed the complainant that he was transferring her to the position of Head of the Office of Confidentiality and Security (OCS), a post which carried a P-5 grade, giving as a reason that, a German citizen having replaced the complainant's supervisor as Director of the Verification Division, some States Parties were concerned that two citizens of one same State Party should not work in a direct line of authority. The transfer took effect from 12 December 2001. It did not affect her conditions of service and she was personally maintained at the D-1 grade.
2. On 5 February 2002 the complainant requested the Director-General to review the decision to transfer her to another position. Her request rested on three grounds. First, that the decision did not respect her dignity; second, that it was not in keeping with her qualifications and former position; and third, that it was based on an error of law and constituted a misuse of authority. This request was initially refused, giving rise to a first internal appeal, but the Director-General later reversed his decision and on 22 March 2002 the complainant was transferred back to the Verification Division, in the capacity of Special Assistant to the Director.
3. On 22 April 2002 the Director-General was removed from office. On 17 May 2002 the complainant was called to a meeting by the Acting Director-General where she says she was told that both her transfers - from Head of PRB to Head of OCS and subsequently from Head of OCS to her current position - were not correct, and that she must have suffered from such a situation.
4. Meanwhile, on 6 May 2002, she had requested a review of the former Director-General's decision dated 22 March 2002 to transfer her to the position of Special Assistant to the Director of the Verification Division. She considered that this decision was "part of a moral harassment against [her]". The Acting Director-General did not reply in writing to the request for review and on 2 July 2002 the complainant submitted a second internal appeal to the Appeals Council.
5. The two pending appeals were combined into one. The Appeals Council noted that the complainant had not suffered financially as a result of the two transfers, since her D-1 grade was always maintained. The Council also found that her good professional name was never put into question by any of the actions of the successive Directors-General. It further noted that the initial decision at the root of the complainant's appeal was overturned by the Director-General who had taken it, and that the latter's successor had agreed to rectify the situation "as a matter of principle and good faith". Thus, the Council did not consider that the actions under appeal constituted moral harassment against the complainant, but rather that they were the result of a lack of judgement by the former Director-General in the use of his discretionary powers when making the administrative decision to transfer the complainant from her post of Head of PRB in December 2001. Notwithstanding its finding that the actions of the

Organisation did not constitute moral harassment, the Council found that the complainant did suffer moral injury, and that since reinstatement in her original post was not appropriate, such moral injury would be ongoing until an opportunity arose to reinstate her in a position in keeping with her background, qualifications, position and status within the Organisation and commensurate with her position of Head of PRB.

6. The Council recommended that the complainant be reinstated on these terms. In recognition of the moral injury suffered, it recommended a lump-sum award of 10,000 euros in compensation.

7. On 4 November 2002 the new Director-General, after referring extensively to the report of the Council, accepted its recommendation that the complainant be reinstated in a position in keeping with her background, qualifications and status within the Organisation, something which he considered to be possible in her current position of Special Assistant to the Director of the Verification Division. He accordingly asked the latter to finalise an appropriate job description for the complainant's current post. With regard to the Council's finding that the complainant had suffered moral injury, the Director-General noted that the initial transfer was rapidly reversed and replaced with another transfer, albeit with functions to be determined. He also noted that the Council had concluded that the complainant did not suffer financially, that her good name was never put into question, and that the actions under appeal did not constitute moral harassment against her. Although the Director-General did not believe there was sufficient evidence to support a finding of moral injury, he accepted the finding for the purposes of resolving the problem. However, he thought the recommendation that the complainant be compensated with an award of 10,000 euros was incorrect. Due to "the intangible nature of the injury", the "objective limitations in terms of available positions in the Secretariat", and in view of the Council's finding that the complainant's good professional name was never put into question throughout the process, the Director-General agreed to grant the complainant 1,000 euros as a symbolic reparation for that injury. That is the impugned decision.

8. The complainant submits that the impugned decision is illegal, since it does not comply with the good faith principle, and it does not respect the OPCW's obligation to compensate her fully for the injuries she suffered. When, on 4 November 2002, the Organisation committed itself to reinstate the complainant to a position more befitting her experience and qualifications and commensurate with her actual D-1 grade, she was already occupying the P-5 position of Special Assistant to the Director of the Verification Division, although the Director-General intended to turn that position into a D-1 with duties corresponding to that level. However, the complainant is still in a P-5 position. The OPCW conveyed to the complainant that it would take action to rectify the situation, but as of yet, she maintains, nothing has been done.

9. She says that the injury she has suffered is twofold: first, damage to her dignity has been established, as a result of being transferred twice in three months and *de facto* downgraded to a P-5 position. She says she resented "floating" without a specific functional title. Further, the impugned decision did not put an end to the damage to her dignity since nothing significant has changed in her employment situation. Second, the Organisation also greatly prejudiced her career prospects. The complainant's contract, which was due to expire on 31 July 2003, has since been renewed for a period of one year.

10. The complainant requests that the impugned decision be set aside, and that the OPCW be ordered to pay 5,000 euros per month, retroactively from December 2001, in compensation for the moral injury suffered, until such time as she is reinstated in a D-1 position in keeping with her background, qualifications, position and status within the Organisation. She also requests a lump-sum payment equivalent to two years' salary in compensation for the damage to her career prospects.

11. Quite apart from the egregiously exaggerated claim for monetary compensation on the part of a person who has suffered absolutely no monetary loss and no loss of status or position, the complaint cannot succeed. While there is no doubt whatever that the Organisation owes a duty of good faith to its staff - "[r]elations between an organisation and its staff must be governed by good faith" (see Judgment 2116) - bad faith must be proved and is never presumed. Here, there is a complete absence of evidence either subjective or objective of bad faith on the part of those responsible for the various contested transfer decisions. While clearly and admittedly mistakes were made, there is no indication that the decision makers made them otherwise than honestly and in the genuine belief that they were acting in the best interests of the Organisation.

12. Although to act in bad faith is always to mismanage, the reverse is not the case and honest mistakes or even sheer stupidity will not, without more, be enough. Bad faith requires an element of malice, ill will, improper motive, fraud or similar dishonest purpose. There is absolutely nothing of that here.

13. The complainant has no doubt been the victim of a certain degree of confusion, indecision and perhaps even incompetence on the part of her superiors at a time when the Organisation itself was going through a period of serious ructions and dramatic change at the top. She, herself, however, maintained her grade and salary and continued, throughout the period in question, to receive high and complimentary assessments from her supervisors on the quality of her work.

14. She has suffered no impairment to her dignity. She was consulted with respect to each of the contested transfers and although her protests were not successful, she cannot say that she was not heard. The Director-General has the discretion to exercise his authority pursuant to Staff Regulation 1.2 and although he may have exercised his judgment incorrectly (as was found by the Appeals Council), he did not do so in bad faith and was not obliged to accept her objections.

15. Once it had recognised its mistakes, the Organisation was diligent in its attempts to put matters to rights. If the complainant has suffered any moral injury at all, she is more than adequately compensated by the award made to her in the impugned decision. There is absolutely no evidence that her career prospects have been adversely affected in any way.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet