

The Administrative Tribunal,

Considering the second complaint filed by Mrs E. C. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 31 October 2003 and corrected on 12 December 2003, the OPCW's reply of 22 March 2004, the complainant's rejoinder of 14 June, and the Organisation's surrejoinder of 27 August 2004;

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

Having examined the written submissions;

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

A. The complainant is a former staff member of the OPCW. Facts relevant to her career are to be found in Judgment 2324, delivered on 14 July 2004, on her first complaint, in which the Tribunal ordered the Organisation to pay compensation to the complainant for having placed her on special leave with pay under questionable circumstances.

On 30 April 2003, following a recommendation by the Executive Council of the Organisation, the Conference of the States Parties adopted a decision entitled "Tenure Policy of the OPCW" in which it reaffirmed the nature of the OPCW as a "non-career" organisation with a limited staff tenure policy of seven years. At the same time it decided that the average rate of staff turnover, as from calendar year 2003, would be one-seventh per year; it also authorised the Director-General, in certain exceptional circumstances, to grant extensions or renewals of contract in excess of the seven-year limit.

In a memorandum dated 13 May 2003 from the Director of Administration to the Acting Head of the Human Resources Branch, the former recommended that the complainant not be offered a contract extension because of material and significant changes in the scope and responsibility of her post (which was at the P-5 grade) and because she had "not performed in a manner which [was] acceptable". By a letter of 16 May the Acting Head of Human Resources informed the complainant that, pursuant to the decisions of the Executive Council and the Conference of the States Parties, the Director-General regretted that she would not be offered an extension of her fixed-term contract upon its expiry on 6 August 2003, but that nonetheless he was prepared to offer her "a special extension of up to six months [...] should [she] so require". In a memorandum of 20 May she replied to the Acting Head of Human Resources that she accepted "the offer of the Director-General to extend [her] contract for 3 months and 13 days"; she added that her acceptance was made without prejudice to her right of appeal.

On 11 July 2003 she wrote to the Director-General, requesting him to review "the decision not to renew [her] contract, (even if it includes an offer of a special extension for 3 months and 13 days)". In the event that he was unable to grant her request, she asked for leave to submit a complaint directly to the Tribunal, without going through the Appeals Council. On 8 August the Acting Head of Human Resources informed her that, having regard to the staff tenure policy and the annual staff turnover requirement, her separation from service would take effect upon expiry of the special extension. He added that the Director-General would reply in due course to her request for a waiver of jurisdiction to appeal directly to the Tribunal. On 21 August she was informed that the waiver had been granted. She filed this complaint with the Tribunal impugning the decision of 8 August 2003.

B. In her submissions the complainant recognises that decisions not to renew a contract fall within the Director-General's discretionary authority, but that there is a distinction between such authority and arbitrary power. She contends that the decision was arbitrary, and as such is reviewable by the Tribunal. She also contends that the decision was tainted by an abuse of authority, since it was taken to satisfy the Director of Administration's personal grudge against her.

The complainant argues that it is a general principle of law that decisions not to renew a contract must be substantiated; in her view, that principle was not complied with and the decision was illegal. She also says that there has been a breach of the obligation to protect her dignity as a staff member and not to cause her unnecessary

hardship.

In subsidiary pleas, she contends that there has been breach of the principle of non-retroactivity. In addition, Staff Regulation 12.1 states that the Regulations may be amended, but that such amendments are without prejudice to the existing contracts of staff members. She considers that there have also been breaches of the principle of good faith and due process of law. The decision not to renew her contract has caused injury to her good name and career prospects.

She asks the Tribunal to quash the impugned decision and to order the Organisation to pay her compensation equal to four years' gross salary. She also claims costs.

C. In its reply the OPCW objects to the receivability of the complaint, on the grounds that the complainant has not challenged a final decision. The decision of 8 August 2003 confirmed the one of 16 May 2003 not to renew her contract upon its expiry. In addition, it constituted a new administrative decision to award her a final extension until 15 November 2003. It was only subsequent to the date that this was notified to her, on 8 August 2003, that she could have legally impugned that decision by first requesting the Director-General to review it. She failed to do so. In any event, the Organisation denies that the letter of 16 May also contained a decision to extend her contract "for 3 months and 13 days".

On the merits, the Organisation first points out that the complainant accepted her appointment on 7 August 2000 subject to "all the conditions" set out in the Organisation's Staff Regulations and Interim Staff Rules. As such, she accepted that there was no expectation of any extension or renewal of appointment. Additionally, the Tribunal has long held that the Director-General has discretionary authority over decisions concerning contract renewals. There has been no breach of the obligation to substantiate a decision; the Director-General was merely implementing the staff tenure policy set out by the Conference of the States Parties and therefore there was no need to provide further reasons for the non-renewal.

The OPCW denies that there was any abuse of authority. It submits that the decision was taken exclusively by the Director-General and no staff member had the slightest responsibility or influence with regard to the decision. It adds that the complainant has not provided any proof that the decision was taken in order to satisfy any alleged grudge against her. Nor has she provided any proof that the Organisation has not complied with the obligation not to cause unnecessary hardship or that it has breached the principle of non-retroactivity. It has not acted in bad faith; the complainant has benefited from "a special final extension" of her contract, even though she had no right to one. There has been no breach of due process and it denies that she has suffered any prejudice.

The defendant makes a request for hearings, stating that the outcome of this and other current, and possible future, complaints challenging the staff turnover policy is highly relevant to the financial stability and operational effectiveness of the Organisation.

D. In her rejoinder the complainant rebuts the Organisation's pleas concerning receivability. She accuses the OPCW of acting in bad faith and trying to create procedural confusion.

She points out that, on the one hand, the OPCW asserted that, before the Director-General took the decision not to renew her contract, he took into account the recommendation of her Director, and, on the other hand, it asserted that neither the latter, nor any other staff member, had the slightest responsibility for, or had influenced the Director-General's decision. It also asserted that the procedural requirements had been satisfied. The complainant rebuts all these assertions. She considers that, for the most part, the Organisation has abstained from replying directly to her arguments.

She maintains that the decision has not been properly substantiated and that the OPCW is still unable or unwilling to explain precisely why she was selected "for annual turnover". She argues that the impugned decision was flawed by errors of law. She comments on the OPCW's application for hearings.

E. In its surrejoinder the Organisation maintains its objection to receivability and points out that the letter of 21 August 2003, in which the Organisation informed the complainant that the Director-General had granted her a waiver to appeal directly to the Tribunal, also contained a caveat that the waiver was "without prejudice to the Organisation's right to challenge, before the Tribunal, [her] complaint on such grounds as it may deem appropriate". Thus, the objection to receivability should not come as a surprise to the complainant, nor should it be

taken as an act of bad faith.

It submits that there is no contradiction between asserting that the complainant's Director had provided the Director-General with a recommendation and asserting that the decision came entirely from the latter. In any event, this had no effect on the non-renewal of the complainant's contract, since the decision not to renew her contract was taken in pursuance of the staff turnover policy. In addition, the OPCW submits that the reasons given to the complainant for the non-renewal are satisfactory when seen in the light of the Tribunal's case law. It denies that there were errors of law.

CONSIDERATIONS

1. As do the complainants in the case considered in Judgment 2407, also delivered this day, the complainant challenges a final decision not to renew her contract. As with those complainants, the decision was said to be based on the staff turnover policy recommended by the Executive Council of the Organisation in March 2003 and adopted by the Conference of the States Parties in April of that year.

2. There are a number of similarities between the present case and the case of the complainants considered in the above-mentioned Judgment. To the extent that the present complainant puts forward the same argument with respect to retroactivity, that argument must be rejected for the reasons given in Judgment 2407. Because the OPCW challenges the receivability of the complaint on the same grounds as in that case, its arguments must also be rejected and for the same reasons. Similarly, for the reasons given in the said Judgment, the application by the OPCW for an oral hearing must be rejected.

3. There are also significant differences between the present case and the case of the complainants considered in Judgment 2407. The first difference is that the complainants in that case had been employed for periods ranging from nearly five to nearly six years, whereas the present complainant had not served three years when she was informed that her contract would not be renewed. The second difference is that, save in the complaint of Mrs E., in which the facts are not clear, the decisions considered in the said Judgment were made following recommendations based on the staff turnover policy. In the present case, there was no recommendation based on that policy; there was, however, a recommendation based on unsatisfactory performance.

4. Another difference is that the present complainant had a troubled employment history within the OPCW, whereas the other complainants point to no such history. Rather, they point to an employment history where their performance had routinely been assessed as high or satisfactory and, prior to its abolition, the Contract Extension Board appears to have recommended the extension of all the contracts for at least another year.

5. The final difference that should be noted is that the complainants whose complaints were considered in Judgment 2407 assign no credible reason, other than the staff turnover policy, for the decision not to renew their contracts. The present complainant contends that, in her case, the decision was taken because of the Director of Administration's "personal grudge" against her. For this reason, it is argued, the decision involved an abuse of authority, want of good faith and was taken in breach of the obligation to protect her dignity and reputation and not to cause her unnecessary distress.

6. By way of relief, the complainant seeks to have the Director-General's decision of 8 August 2003 confirming his earlier decision not to renew her contract set aside and, also, seeks compensation equivalent to four years' gross salary, and costs.

7. In order to understand the complainant's argument, it is necessary to recount part of her employment history within the OPCW. She commenced employment on 7 August 2000 as Head of the Budget and Finance Branch under a three-year fixed-term contract.

8. During the latter part of 2001 the relationship between the complainant and her then supervisor, who had been appointed as the Director of Administration in August of that year, was extremely fraught. The relationship degenerated to the point where the Director placed her on special leave with pay from 12 December 2001 until further notice. In Judgment 2324 the Tribunal held that the decision was illegal and actuated by hostility and ill will.

9. The complainant did not resume duty as the Head of the Budget and Finance Branch until 6 November

2002. The decision that she should resume duty was taken by the Director-General, notwithstanding that the Director of Administration had recommended against that course.

10. The relationship between the complainant and the Director of Administration seems not to have improved in any significant respect following her return to duty, with the latter frequently criticising the quality of her work in writing without first discussing matters with her. Thus, on 13 December 2002, he sent her an e-mail criticising various of her cash projections as either “understated and irrelevant”, “incorrect and overestimated” or “understated and unrealistic”. The complainant replied to that e-mail asking for the details of the assumptions which led to the Director of Administration’s criticism and indicating that she would present the assumptions on which she had worked at a meeting on 9 January 2003. The situation deteriorated even further when, by a memorandum dated 28 March 2003, the Director of Administration discharged the complainant from further responsibility with respect to the external audit and instructed two staff members for whose supervision she was responsible to report directly to him. In two further memoranda sent to the complainant on the same day, he criticised the way in which she had responded to certain queries of the auditors and castigated her for attending a training course instead of attending to the auditors’ requests.

11. The complainant replied to these three memoranda, answering the Director of Administration’s criticisms and observing that, in her opinion, he was seeking to “discharge [her] from the establishment of the Financial Statements”. She compared the situation with that which had occurred in 2001 and indicated her belief that he had undertaken that action because her methodology would reveal the true financial situation with respect to the Provident Fund of the OPCW.

12. On 3 April the Director of Administration, who was also a member of the Management Board of the Provident Fund, forwarded the Fund’s 2002 Financial Statement to other members of the Board, stating that the external auditors had requested that the statement be signed by the close of business that day. The following day, the complainant replied to him specifying a number of reservations with respect to the accounts and stating that, in her view, they did not give “a true or fair view of the financial situation as of 31 December 2002”. The Director replied by e-mail, stating that he had found nothing “material or substantive” in her comments but that he would bring her concerns to the attention of the Chairman of the Management Board and the auditor.

13. The next difference to emerge between the complainant and the Director of Administration concerned a budget status report. In an e-mail of 8 April, the Director expressed certain difficulties with the complainant’s calculations which, he said, were “not consistent” with the report issued by the Director-General and instructed her to use “the existing methodology”. The complainant replied to the Director, by a memorandum dated 10 April, that he had approved the use of her methodology on 21 March 2003 and she suggested an alternative which, in her view, would “identify the area for which budget transfers [were] required”. She sought instructions as to whether, in view of her suggestion, he wished to confirm the use of the old methodology.

14. The complainant wrote to the same Director on 15 April enclosing the budget status reports for February and March 2003 and stating that they had been prepared in accordance with the old methodology. She noted several deficiencies in the reports, including that they gave an inaccurate picture with respect to salaries and would cause difficulties for programme managers. She also stated that it had been agreed that the April report would be based on calculations using the methodology that she had earlier proposed.

15. The following day, 16 April 2003, the Director of Administration directed two staff members who worked under the complainant’s supervision to disregard instructions she had given relating to the Provident Fund accounts. The complainant wrote to the Director-General on 22 April stating her belief that her instructions had been countermanded, “not to improve the financial management of the OPCW, but to disrupt it for personal reasons”. She referred to certain accounting difficulties, including “lack of action about urgent financial decisions because of the refusal of the Director of Administration to discuss [them] with [her]”. She concluded by saying that, as a result of the various differences that had arisen, she was no longer in a “position to fulfil the assignments described in [her] job description”.

16. The complainant had a short meeting with the Director of Administration on 23 April during which, according to her account, she was told, amongst other things, that she was trying to ruin his reputation by “pretending that he had crooked [*sic*] the books” and that he would “make her life miserable, whatever be the cost”. In any event, he wrote to her the following day stating that he would “not tolerate another insinuation [...] about alteration of figures in accounts or reports” and saying that she should “[h]ave [her] evidence and defence

well established, because [he] intend[ed] to pursue a personal case of libel and slander against [her]”.

17. At a meeting on 30 April with the Deputy Director-General to discuss her relationship with the Director of Administration, the complainant indicated, after enquiry, that she was prepared to accept a transfer to another post. She was informed by the Director of the Office of Internal Oversight on 15 May 2003 that she was to be transferred to that Office but that her contract would not be renewed in August. In the meantime, on 13 May, the Director of Administration recommended that the complainant's contract not be renewed.

18. There is a dispute as to whether a copy of the Director of Administration's recommendation was provided to the complainant. That issue need not be pursued. What is important is that the recommendation made no reference whatsoever to the staff turnover policy. Rather, the recommendation was based on what was said to be the changed responsibilities of the complainant's post, which would require its being advertised, and her unsatisfactory performance.

19. On 19 May the complainant received a letter from the Acting Head of Human Resources in substantially the same form as those forwarded to the complainants whose case is considered in Judgment 2407, informing her that, due to annual staff turnover requirements, her contract would not be extended, save for a limited period to ensure six months' notice before separation.

20. The complainant was transferred to the Office of Internal Oversight on 17 June 2003, in which position she remained until her contract came to an end on 15 November. She claims that from 25 August until the date of her separation she was provided with no work in her new position.

21. Although the OPCW asserts that the impugned decision was taken pursuant to the staff turnover policy adopted on 30 April 2003, and for no other reason, there is reason to doubt that that is the case. And that is so even though the contracts of other persons with less than seven years' service were not renewed. As mentioned earlier, the complainants whose case is considered in Judgment 2407 were persons whose contracts would otherwise have been renewed in the ordinary course. In the present case, the indications are that the complainant's contract may well not have been renewed in the ordinary course and, had it not been, that any decision based on performance would have been challenged. In this regard, it may be noted that the complainant's 2001 performance appraisal report had been held by a Rebuttal Panel to be “in substance and procedure, inconsistent with the goals and purposes of the [performance appraisal] system” and she had made known her view that the 2002 report suffered from the same deficiencies.

22. In its reply the OPCW asserts, on the one hand, that neither of the matters raised in the Director of Administration's recommendation were taken into account in the decision not to renew the complainant's contract and, on the other, that, in reaching his decision, the Director-General took account of, amongst other things, her performance appraisal report. The apparent inconsistency would be explicable if a selection had to be made between staff members in the area in which the complainant was employed, as was the case of the members of the Inspectorate considered in Judgment 2407. However, there is no suggestion that there was any selection between staff members in the area in which the complainant worked, or any procedure, of any kind, related to the staff turnover policy.

23. When the above matters are analysed in the context of the open and long-standing hostility between the complainant and the Director of Administration, much of which is recounted in Judgment 2324 and which was clearly made known to the Director-General on 22 April 2003, it must be concluded that the decision not to renew her contract was not taken in implementation of the staff turnover policy. That is not to say that it was taken at the behest of the Director of Administration or any other person. Nor is it to say that the decision was taken to satisfy a personal grudge on the part of the Director of Administration. However, in the face of that hostility and in the absence of any relevant procedure or recommendation based on the staff turnover policy, it is to be concluded that the decision was taken to rid the OPCW of the serious personal and professional conflict that existed between two senior members of the Secretariat and to avoid the necessity of taking steps to resolve that conflict. That was an improper purpose and to take a decision for that reason under cover of implementation of the staff turnover policy is both an abuse of authority and an act which demonstrates want of good faith.

24. It follows that the Director-General's decision of 8 August 2003 to confirm his earlier decision not to renew the complainant's contract must be set aside.

25. The complainant's claim for compensation equivalent to four years' gross salary must be rejected. The complaint is based upon the non-renewal of her contract for a further period of one year. It is entirely speculative as to whether, if her contract had been thus renewed, it would have been renewed thereafter. The proper measure of compensation is the amount of net salary that the complainant would have received from 15 November 2003 to 6 August 2004, that being the salary of which she was deprived by the impugned decision. She is also entitled to moral damages in the sum of 25,000 euros for harm to her dignity and reputation and to her costs in the sum of 3,000 euros.

DECISION

For the above reasons,

1. The Director-General's decision of 8 August 2003 is set aside.
2. The OPCW shall pay the complainant the amount of net salary that she would have received from 15 November 2003 until 6 August 2004 if she had been employed until the latter date and moral damages in the sum of 25,000 euros.
3. It shall also pay her 3,000 euros in costs.

In witness of this judgment, adopted on 11 November 2004, 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 2 February 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet