

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**M.**  
**v.**  
**OPCW**

**126th Session**

**Judgment No. 3993**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr K. M. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 9 September 2015 and corrected on 4 November 2015, the OPCW's reply of 19 February 2016, the complainant's rejoinder of 17 May and the OPCW's surrejoinder of 30 August 2016;

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 may be summed up as follows:

The complainant challenges the direct appointment of Mr E. to the position of Legal Adviser.

In his opening statement at the 18<sup>th</sup> Session of the Conference of the States Parties on 2 December 2013, the Director-General extended his welcome to those who had recently been chosen for appointment to senior management positions within the Technical Secretariat, including Mr E., who would soon be joining the OPCW as the Legal Adviser. Mr E.'s appointment in that capacity was also communicated to all Directors and Branch Heads (at D-2, D-1 and P-5 levels) by an email of the same day.

On 8 April 2014 the complainant, who was at the time Head of the International Cooperation Branch (D-1), inquired with the Human Resources Branch as to Mr E.'s date of appointment. On 10 April 2014 the Human Resources Branch replied that Mr E. had joined the OPCW on 1 March 2014.

On 25 April 2014 the complainant asked the Director-General to review the decision to appoint Mr E. on the ground that the latter's direct appointment without competition violated Staff Regulation 4.3, as well as Administrative Directive AD/PER/29/Rev.3 setting out the OPCW Recruitment and Selection Procedures. That request was rejected on 19 May and on 11 June 2014 the complainant filed an appeal with the Appeals Council requesting the setting aside of Mr E.'s appointment, the opening of a competition for the post of Legal Adviser, moral damages and costs.

The Appeals Council submitted its report on 26 May 2015. It concluded that the appeal was time-barred, because the complainant had been sufficiently informed of Mr E.'s appointment on 2 December 2013 and, therefore, ought to have submitted his request for review within two months from that date. The Appeals Council added that, in any event, even if the appeal was receivable, the Director-General had acted according to the applicable rules. It recommended that the appeal be rejected and that the Director-General consider putting in place a procedure for informing staff periodically of the appointment of new staff members.

By a letter of 12 June 2015, the complainant was informed that the Director-General had decided to endorse the Appeals Council's recommendation to dismiss his appeal as time-barred, and therefore irreceivable, and unfounded. That is the impugned decision.

The complainant asks the Tribunal to set aside the contested appointment decision and to order the OPCW to conduct promptly a fair and transparent competition for the post of Legal Adviser, in accordance with Staff Regulation 4.3 and the Tribunal's case law and, at the same time, to shield the incumbent of the post from any injury resulting from the quashing of his appointment. He claims not less than 100,000 euros in moral damages for the unhealthy work environment

to which he was subjected as a result of Mr E.'s direct appointment, and another 100,000 euros in moral damages for the career damage which he suffered. He seeks payment of the costs incurred in bringing this complaint, interest on all amounts awarded pursuant hereto from 1 March 2014 through the date that all such amounts are fully paid, and such other relief as the Tribunal deems just, necessary and equitable.

The OPCW asks the Tribunal to dismiss the complaint.

### CONSIDERATIONS

1. The complainant impugns the decision, communicated to him by a letter dated 12 June 2015, by which the Director-General accepted the recommendation of the Appeals Council to dismiss his appeal against the decision to appoint Mr E. to the post of Legal Adviser on the grounds that it was time-barred, and therefore irreceivable, and, in any event, unmeritorious. In his appeal the complainant had stated that he challenged the direct appointment of Mr E. to the subject post, since he was qualified to apply for it and indeed was entitled to be given due consideration as an internal candidate, and that he felt disenfranchised because he did not have an opportunity to compete for it. In the present complaint he asserts that his appeal was receivable, and he maintains his contention that Mr E.'s appointment was unlawful. He contends that it was made without a competitive process in violation of Staff Regulation 4.3, and that it was contrary to the Tribunal's case law and the principle of equal treatment. As for Administrative Directive AD/PER/29/Rev.3 regarding the OPCW Recruitment and Selection Procedures, the complainant argues that its amendment did not grant the Director-General the authority to make direct appointments to posts at the D-2 level and above and, in any case, it does not override Staff Regulation 4.3.

2. The reason for dismissing the complainant's appeal on the ground that it was irreceivable was stated in the impugned decision as follows:

“[T]he Appeals Council found that you had been sufficiently informed of the appointment of [Mr E.] on 2 December 2013 and that your appeal should have been submitted within two months from that date, whereas you only submitted your appeal on 25 April 2014, i.e. more than four months after you received notification of the appointment [...]”

3. Pursuant to the OPCW Staff Regulations and Interim Staff Rules, a staff member wishing to appeal an administrative decision is required to request a review of such decision within two months from the date when she or he is notified of it in writing. An appeal will not otherwise be receivable, unless the specified time limit is waived by the Appeals Council in exceptional circumstances. Relevantly, Interim Staff Rule 11.2.02(a) provides as follows:

“A staff member wishing to appeal an administrative decision pursuant to Staff Regulation 11.1 shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed; such a letter must be sent within two months from the date the staff member received notification of the decision in writing.” (Emphasis added.)

Interim Staff Rule 11.2.03(f) states:

“An appeal shall not be receivable unless the time-limits specified in Staff Rule 11.2.02(a) [...] have been complied with or have been waived, in exceptional circumstances, by the Appeals Council.”

4. In its report, the Appeals Council agreed with the OPCW’s submission that the complainant was “informed sufficiently” of the decision to appoint Mr E. to the subject post on 2 December 2013 during the 18<sup>th</sup> Session of the Conference of the States Parties, and also by an email of the same date and that, accordingly, his appeal, by way of a request for review of 25 April 2014, was late and time-barred.

5. The complainant insists that his request for review of 25 April 2014 was made within the requisite two-month time period, because he did not receive a definitive decision on the appointment of Mr E. to the subject post until he received the email of 10 April 2014. He submits that this was what put him on notice that an appealable decision had been made, because the Director-General’s announcement of 2 December 2013 failed to meet the requirements of an administrative decision, as it lacked the required definitiveness, clarity and finality. According to him,

in his opening statement to the Conference on that date, the Director-General said that he welcomed Mr E. “who ha[d] just joined the Organisation as its Legal Adviser”. The Tribunal holds that the Director-General’s announcement would not have satisfied the requirement of the notification of a decision in writing, as Interim Staff Rule 11.2.02(a) required, but notes the complainant’s statement that he received an email on that same date which relevantly stated as follows:

“Furthermore, I would like to welcome [Mr E.], who shall join the Organization as its Legal Adviser. Although [he] will not be able to join us fully until next year he has kindly agreed to act as Legal Adviser designate during the [Conference of the States Parties] and at the planned [Executive Council] sessions.”

6. The complainant proffers various submissions to support his contention that the email of 2 December 2013, which he obviously received, did not satisfy the requirement of notification. Most of those submissions have no bearing on the critical issue as to the date on which he was notified of the decision to appoint Mr E. as Legal Adviser. For example, he submits that the email of 2 December 2013 did not refer to an administrative decision pursuant to which Mr E.’s appointment was made, nor to the date on which the decision was taken or the date on which Mr E. was to assume work with the OPCW, as he was still employed by another organisation. He further submits that that email did not mention the procedure by which Mr E. was appointed, or the level at which he was appointed, and was therefore a mere statement of intent to appoint him in the future. He also submits that there was no vacancy announcement to fill the subject post. In the main, these submissions confuse the making of an appealable decision, which is not the critical issue concerning receivability in the present case, with the notification of the decision to appoint Mr E. to the subject post (which was already made) in writing, which is the critical issue in order to determine the time limit within which the complainant should have made his request for review.

7. Importantly, however, the complainant submits that the email of 2 December 2013 left it unclear which post Mr E. was to fill, and that he was only properly informed of the decision concerning the

appointment of Mr E. when he received the email confirmation from the Human Resources Branch on 10 April 2014. The Tribunal considers that, while the email of 2 December 2013 notified the complainant of the appointment of Mr E. as Legal Adviser, it did not specify whether the appointment was at the D-1 level, which the complainant held, or at the D-2 level, for which the complainant wished to apply. It was by the email of 10 April 2014, which confirmed implicitly that the appointment was at the D-2 level, that the complainant was properly notified. Accordingly, his request for review, which was filed on 25 April 2014, was made within the required time limit. It was therefore receivable.

8. It is also determined that the appointment of Mr E. to the subject post was unlawful. This finding is made with particular reference to Judgment 2959, in which the OPCW was the defendant and in which the Tribunal, in considerations 5 to 7, analysed provisions which were virtually the same as those that are applicable in the present case. A detailed reproduction of these considerations will support this determination. They state as follows:

“5. Article VIII, paragraph 44, of the Chemical Weapons Convention provides:

‘[t]he Director-General shall be responsible to the Conference and the Executive Council for the appointment of the staff and the organization and functioning of the Technical Secretariat. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. [...]’

Staff Regulation 4.3 provides:

‘[s]election of staff shall be made without distinction as to race, gender or religion. So far as practicable, selection shall be made on a competitive basis. Selection and appointment of candidates shall also be done in a manner that ensures transparency of the process [...]’

6. The Tribunal is of the opinion that the impugned decision violated the complainant’s right to compete for a post, as Regulation 4.3 provides no explicit and specific exemption from the requirement that selection be made on a competitive basis for the post of Chief of Cabinet, and the ‘impracticability’ of the competitive selection process cannot be based on the post itself. Furthermore, the Director-General did not provide any reasons why he considered a competition as not practicable in the appointing of Mr E. to the vacant post. This demonstrates a lack of transparency in the appointment.

The decision violated provisions which are designed to ensure a certain level of transparency and competition for all posts. Specifically, Article 11 of Administrative Directive AD/PER/29/Rev.2 and Articles 8 and 10 of Administrative Directive AD/PER/37/Rev.1 respectively provide that vacancy notices shall be posted, that when vacancies are open to external candidates such notices shall be posted both internally and externally, and that full regard shall be given to internal candidates in the competitive selection process. Contrary to the Organisation's arguments, the above-mentioned directives are not inconsistent with the authority of the Director-General. Rather, they serve to reinforce the necessity for transparency in the appointment process.

7. As mentioned above, the expression 'so far as practicable' cannot be interpreted to mean that for certain specific posts a competitive selection process can automatically be considered as not practicable (*ubi lex voluit dixit, ubi noluit tacuit*). In Judgment 2620, referring to the same expression 'so far as practicable', the Tribunal held that:

'those words confer power on the Director-General to determine whether or not a competition is practicable. However, that is not a general or unfettered discretion. There must be something in the circumstances of the vacancy upon the basis of which the Director-General might reasonably conclude that a competition is not practicable.'

Again, the Tribunal notes that the 'impracticability' cannot refer to particular posts (as in that case the exception to the general rule should be explicitly expressed), but instead must relate to particular situations such as a 'need to fill a vacancy quickly to relieve a backlog of work or to satisfy existing or future work commitments' (see Judgment 2620, under 9). In the present case, the Organisation relies on the unique nature of the position of the Chief of Cabinet and 'the responsibilities to be performed by the post holder' as justification for the need for the Director-General to select the appointee to this position without holding a competition. However, as observed by the Appeals Council, there is nothing to prevent the Director-General from contacting particular employees he finds suitable and encouraging them to apply for the position, thereby maintaining transparency in the competitive selection process, and appointing a fully qualified candidate to the post.

Furthermore, the existence of an established practice of directly appointing the Chief of Cabinet is not relevant, as a practice which is in violation of a rule cannot have the effect of modifying the rule itself, and the fact that employees may be aware of such a practice does not prevent them from exercising their right to impugn a decision based on that practice whenever it affects them. Likewise, the Organisation's assertion that the complainant as Deputy or Acting Legal Adviser never commented on the legality of the said practice, is irrelevant. It is enough to observe that the complainant, uncontestedly, was never asked for his opinion on the subject."

9. Paragraph 7 of Administrative Directive AD/PER/29/Rev.3 in force at the material time, under which the Director-General has the prerogative to make appointments to D-2 level posts based on recruitment and selection procedures which do not involve a competitive process, did not provide a basis for the appointment that exempts it from this analysis. Staff Regulation 4.3 stipulates that:

“Selection of staff shall be made without distinction as to race, gender or religion. So far as practicable, selection shall be made on a competitive basis.”

The decision to appoint Mr E. to the subject post without a competitive process violated Staff Regulation 4.3 (cited in consideration 8, above), as the Director-General did not provide any reasons why he considered a competition as not practicable. Moreover, the decision violated the provisions of paragraph 4 and paragraphs 9 to 55 of Administrative Directive AD/PER/29/Rev.3, which are designed to ensure a certain level of transparency and competition for all posts. The impugned decision will therefore be set aside, as must the decision appointing Mr E. to the subject post. This will be on the understanding that the OPCW shall shield him from any injury that may flow from the setting aside of the impugned decision and his appointment, which he had accepted in good faith (see Judgment 3742, under 14). Given the effluxion of time, no order will be made for a competition to fill the subject post.

10. In light of this decision, it is unnecessary to consider the complainant’s application for oral hearing under Article 12, paragraph 1, of the Tribunal’s Rules.

11. The complainant does not seek material damages. However, he is entitled to 4,000 euros in moral damages for the violation of his right to compete for a post. He is also entitled to costs in the amount of 5,000 euros.



DECISION

For the above reasons,

1. The impugned decision, contained in the letter dated 12 June 2015, is set aside, as is the decision to appoint Mr E. to the subject post.
2. The OPCW shall ensure that Mr E. is shielded from any injury that may flow from the setting aside of the impugned decision and his appointment, which he had accepted in good faith.
3. The OPCW shall pay the complainant moral damages in the amount of 4,000 euros.
4. It shall pay the complainant costs in the amount of 5,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 16 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ