

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**130th Session**

**Judgment No. 4296**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. M. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 8 November 2018 and corrected on 21 November 2018, the OPCW's reply of 27 February 2019, the complainant's rejoinder of 11 April and the OPCW's surrejoinder of 18 July 2019;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant requests that allegedly offensive remarks be removed from an investigation report.

At the material time, the complainant was employed under a fixed-term contract as a Team Leader in the Inspectorate Division. On 30 November 2015 Mr S., another staff member, filed a formal harassment complaint against several members of the Inspectorate Division, including the complainant.

On 12 July 2016 the Secretary of the Investigative Team forwarded to the persons concerned a draft report and invited them to submit their comments by 20 July. On 19 July the complainant stated that he had no further comments. Mr S. submitted three sets of comments on 20 July, 21 July and 4 August. In its final investigation report of

23 August 2016, the Investigative Team concluded that the evidence and the facts ascertained in the course of the investigation did not support Mr S.'s allegations of harassment.

In a letter dated 5 September 2016, which was copied to the complainant, Mr S. was informed that the Director-General, who had reviewed the investigation report, found that the behaviour alleged in his complaint did not constitute harassment as defined in the Administrative Directive AD/PER/42/Rev.1 and accordingly had closed the case. It was mentioned that no record of the complaint or the subsequent investigation would be placed on the personal file of any of the staff members involved. A copy of the final investigation report was attached to that letter.

On 6 March 2017 the complainant, whose contract had expired on 8 April 2016, wrote to the Secretary of the Investigative Team, stating that two paragraphs of the final investigation report – which were not included in the draft report – contained remarks made by Mr S. which were “highly offensive” against him. He requested that these paragraphs be removed from the report, given that he had not been given an opportunity to comment on the remarks before the report was finalized. By a letter of 27 March, the Investigative Team invited him to submit his comments, stating that they would be filed together with the report, which, it added, had only been shared with the people involved in the investigation.

On 10 April 2017, the complainant submitted a request for review of the “decision” contained in the letter of 27 March 2017, asserting that his request had been definitively rejected. On 3 May the Director of Administration, acting on behalf of the Director-General, informed him that his request for review was time-barred and thus rejected as irreceivable as it had not been filed within two months from the date he received notification of the final investigation report, as required by Interim Staff Rule 11.2.02(a).

On 6 June 2017 the complainant filed an appeal with the Appeals Council. He requested that the decision of 27 March 2017 be set aside, that the offending passages be removed from the investigation report and that he be awarded costs. In its report of 13 August 2018, the Appeals Council concluded that the appeal should be dismissed as irreceivable. On 30 August 2018 the complainant was informed that the Director-General had decided to maintain the decision of 27 March

2017, in accordance with the Appeals Council's conclusion. That is the impugned decision.

The complainant requests the Tribunal to quash the impugned decision, to order the OPCW to remove the offending passages from the final investigation report and to pay him moral damages in the amount of 50,000 euros. Finally, he seeks costs for the internal appeal proceedings and the proceedings before the Tribunal.

The OPCW submits that the complaint should be dismissed as both irreceivable and unfounded.

#### CONSIDERATIONS

1. This case arose out of a formal harassment complaint which the complainant's colleague, Mr S., instituted against him and others in November 2015. The complainant accepted the draft investigation report, which was sent to him and to Mr S., among other persons, on 12 July 2016. He replied on 19 July 2016 stating that he had no other comments on it. However, Mr S.'s comments, which contained scandalous and offensive remarks about the complainant and other colleagues, who were not given an opportunity to respond to them, were reproduced in the final investigation report completed on 23 August 2016. The Investigative Team recommended that the harassment complaint against the complainant and the other subjects of the investigation be dismissed. In the letter of 5 September 2016, the Director-General accepted that recommendation, closed the case and transmitted the letter and a copy of the final investigation report to all parties concerned.

2. In a letter to the Secretary of the Investigative Team some six months later, on 6 March 2017, the complainant requested that the offending passages be removed from the final investigation report. By letter dated 27 March 2017, the Investigative Team invited the complainant to submit his comments on the offending passages to be filed with the report. It also informed him that the report was classified as "Staff-in-Confidence"; that it had only been shared with the persons who were involved in the investigation and that no record of the harassment complaint or of the investigation would be placed on his personal file. By letter dated 10 April 2017 the complainant

submitted a request for review of that reply pursuant to Interim Staff Rule 11.2.02(a). This was on the ground that his right to be afforded due process in the investigation was violated because, contrary to paragraph III.3 of the Uniform Guidelines for Investigations in Administrative Directive AD/ADM/26, he was not given an opportunity to be heard to permit him to object to the offending passages before they were included in the final investigation report. He insisted that merely permitting him to comment on the offending passages in the final report, as the investigators suggested, could not rectify the “significant flaw” even if his comments were attached to the report.

3. Interim Staff Rule 11.2.02(a) relevantly states 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.”

Staff Regulation 11.1 relevantly states as follows:

“Staff members have the right of appeal against any administrative decision alleging non-observance of the terms of appointment, including relevant Staff Regulations and Rules, and against disciplinary action.”

4. The letter of 3 May 2017, issued on behalf of the Director-General, rejected the complainant’s 10 April request for review. This was on the ground that it was time-barred, and thus irreceivable, pursuant to Interim Staff Rule 11.2.02(a), because the request could only have been directed against the Director-General’s decision in the letter of 5 September 2016 which dismissed Mr S.’s harassment complaint. The Appeals Council agreed with this finding and, in the impugned decision, the Director-General accepted its recommendation to dismiss the appeal on the ground that the request for review was irreceivable as it was time-barred. This was wrong as the complainant had not purported to contest the 5 September 2016 decision. He specifically requested the review of the “decision” contained in the letter of 27 March 2017 not to remove the offending passages from the final investigation report. Accordingly, his request for review of 10 April 2017 was not time-barred as the impugned decision of 30 August 2018 held, accepting the Appeals Council’s conclusion. The impugned decision was flawed as it wrongly dismissed the appeal on the basis that the request for review was time-barred.

In these circumstances, the Tribunal would ordinarily set aside the impugned decision and remit the case to the Organisation so that the appeal can be examined on the merits, but, for reasons that are explained below, it is not appropriate to do so in this case.

5. To support its claim of irreceivability, the OPCW argues, as it did in the internal appeal proceedings, that the complainant does not have a cause of action because he was exonerated from wrongdoing in the final investigation report.

6. Article II, paragraph 5, of the Tribunal's Statute relevantly states that the Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of an official's appointment and of the provisions of the Staff Regulations. In Judgment 4145, consideration 5, the Tribunal recalled that Article II has been interpreted to require that for a complaint to be receivable the staff member must have a cause of action and the impugned decision must be one that, by its nature, is subject to challenge. The Tribunal reiterated, in Judgment 4007, consideration 4, that "for there to be a cause of action a complainant must demonstrate that the contested administrative action caused injury to the complainant's health, finances or otherwise or that it is liable to cause injury" and had stated, additionally, in Judgment 3337, consideration 7, that the decision must have some present effect on the complainant's position.

Inasmuch as the Director-General accepted the Investigative Team's recommendation to dismiss the harassment complaint against the complainant and closed the case, the decision which the complainant challenges had no present effect on his position. Accordingly, the complaint does not disclose a cause of action and will be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 24 June 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ