

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K.
v.
OPCW

134th Session

Judgment No. 4507

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. K. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 22 April 2020, the OPCW's reply of 22 July, the complainant's rejoinder of 21 October 2020 and the OPCW's surrejoinder of 20 January 2021;

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 impugns the decision not to renew his fixed-term appointment.

By a letter of 9 September 2015 the Director-General of OPCW informed the Permanent Representative of the Republic of South Africa to the OPCW, in his capacity as the Regional Coordinator of the Group of African States Parties to the Chemical Weapons Convention, that the position of Director, International Cooperation and Assistance Division (ICA), would soon become available and that he intended to appoint a suitable candidate from the African region in order to maintain equal geographical distribution, in particular, among the senior management of the OPCW Technical Secretariat. He requested the Permanent Representative to invite the African Regional Group to seek names of

suitable candidates for said position and asked that candidacies, together with curricula vitae, be submitted directly to him. The Permanent Representative proceeded as requested.

The complainant, a national of the People's Democratic Republic of Algeria, applied for the position and he was interviewed by the Director-General and Deputy Director-General on 11 March 2016. Effective 22 May 2016, he was appointed Director, ICA, at grade D-2, under a three-year fixed-term appointment.

In early July 2018 the Director-General, whose mandate was coming to an end, told the complainant that the new Director-General, who was due to take up his functions on 25 July 2018, would not renew the complainant's appointment upon its expiry on 21 May 2019. On 25 September 2018 the Deputy Chief of Cabinet and the Head of the Human Resources Branch (HRB) met with the complainant and confirmed the new Director-General's decision not to renew the complainant's appointment beyond its expiry date. The reasons given for this decision were that: (i) the OPCW was in the process of competitively recruiting a new team for its top-level structure and could not maintain the complainant's employment, as this was the result of a direct political appointment; and (ii) following the appointment of a candidate from the African region as Deputy Director-General, the OPCW had to terminate the complainant's appointment in order to maintain equal geographical distribution in its top-level structure. On 1 October 2018 the complainant met with the Director-General and the acting Deputy Chief of Cabinet and the former confirmed that the reasons for the decision not to renew the complainant's appointment were those provided to the complainant at the 25 September meeting.

By a letter of 3 October 2018, the Director-General informed the complainant in writing that his appointment would not be renewed past its expiry date of 21 May 2019. Further to the rejection of his request for review of this decision on 30 November 2018, the complainant filed an appeal with the Appeals Council which, in its report of 13 January 2020, unanimously recommended that the appeal be rejected.

By a letter of 23 January 2020, the complainant was notified of the Director-General's decision to maintain his position, thus rejecting the complainant's appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision as well as the non-extension decision. He requests that the OPCW be ordered to reinstate him retroactively in a position commensurate with his experience and qualifications and to pay him all salary and allowances from the date of separation until the date of reinstatement. Alternatively to the latter claim, the complainant requests that the OPCW be ordered to award him: (i) material damages for the loss of opportunity in an amount equivalent to what he would have earned if his appointment had been extended for four years, including salary, emoluments, allowances and benefits; and (ii) material damages corresponding to his lost pension benefits, i.e. an amount equal to the share of contributions that the OPCW would have made to the Provident Fund if he had remained employed for a further period of four years. The complainant claims moral damages in the amount of 30,000 euros, full reimbursement of the costs he incurred in pursuing his claims, including legal costs, and interest at the rate of 5 per cent per annum on all sums awarded from due dates until the date such sums are paid in full.

The OPCW asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant challenges the 23 January 2020 decision by which the Director of Administration, acting on behalf of the Director-General, endorsed the report issued by the Appeals Council on 13 January 2020 and rejected the complainant's appeal against the 30 November 2018 decision. This latter decision, in turn, had rejected the complainant's application for review of the Director-General's 3 October 2018 decision not to extend the complainant's fixed-term appointment as Director, ICA, at grade D-2, upon its expiry date of 21 May 2019.

The reasons for the non-extension were expressed in the 3 October 2018 decision as follows: “Staff Regulation 4.4(a) and Interim Staff Rule 4.4.01(b)(ii) provide that contracts carry no expectation of renewal and that renewals will become progressively more difficult. [...] [Y]our employment with the Organisation was the result of a direct political appointment by the former Director-General, who confirmed to you prior to his departure in July that your contract would not be extended by the Organisation upon expiration. The Organisation is in the transitional process of competitively recruiting the new team of top structure Directors, including for the Verification and Inspectorate Divisions, the Secretariat for the Policy-Making Organs, and the Office of Internal Oversight. In addition, the Organisation will soon receive its new Deputy Director-General from the same region as you (Africa), and it is necessary to maintain geographic distribution of the top structure, as mandated by the Chemical Weapons Convention.”

These reasons were substantially reiterated in the 30 November 2018 decision with the following addition: “You take issue with the qualification of your appointment as being ‘political’; however, your appointment was undoubtedly the result of a political process, rather than a competitive recruitment process, as indicated by, inter alia, the fact that there was no public vacancy notice for your post.”

The opinion of the Appeals Council was formulated in its 13 January 2020 report as follows:

- “• the decision [not to] renew the [complainant]’s contract has been made in accordance with the aforementioned rules;
- criteria [...] taken into consideration which led to the decision not to renew the [complainant]’s contract are of legitimate nature and represent good practice of competitive recruitment process;
- there are no elements which may suggest the lack of legitimacy of the Director-General [in] making the decision;
- good practice of equal treatment and inclusion have been respected.”

2. The arguments in support of the complaint can be summed up as follows:

- (i) flaws affecting the impugned decision: violation of the complainant’s right to an effective internal appeal; and

- (ii) flaws affecting the non-extension decision:
- (a) the non-extension decision was tainted by an error of fact;
 - (b) the non-extension decision was tainted by an error of law;
 - (c) the non-extension decision was tainted by a breach of the rules of procedure, in particular as paragraphs 3 to 5 of Administrative Directive AD/PER/28 on Contract Extensions were violated;
 - (d) the non-extension decision was tainted by the OPCW's contradictory conduct and misuse of authority;
 - (e) the OPCW violated its duty of care towards the complainant;
 - (f) the OPCW violated the Tribunal's case law on "direct political appointments";
 - (g) the OPCW infringed the principle of equal treatment.

3. The complainant's plea that his right to an effective internal appeal was violated is unfounded. The complainant alleges that the internal appeal process was flawed since the Appeals Council's report consists of only a few statements, which fail to respond to – or even discuss – the complainant's factual and legal submissions. According to the Tribunal's case law, the reasons given by the internal appeal body must respond to all the issues raised by the appellant, and therefore must be complete in substance (see Judgment 4063, consideration 5). However, it is neither unlawful nor inappropriate that the reasons given by the internal appeal body are succinct (see Judgment 4165, consideration 8), provided that they are adequate. The Tribunal notes that the Appeals Council declared in its report that it had examined all the relevant documents and submissions of the parties, and referred to all relevant facts. The conclusions in the report, articulated in four bullet points, are adequate despite their brevity and address all the issues raised by the complainant.

4. In order to examine the complainant's challenges to the non-extension decision, it is appropriate to reproduce the relevant staff regulations and rules in force at the material time:

“Regulation 4.2

The paramount consideration in the appointment, transfer and promotion of staff shall be the necessity of securing the highest standards of efficiency, professional competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible [...] Recruitment shall be guided by the principle that the staff shall be kept to a minimum necessary for the proper discharge of the responsibilities of the Secretariat.

Regulation 4.3

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. Selection and appointment of candidates shall also be done in a manner that ensures transparency of the process and consistency with the principles contained in Staff Regulation 4.2, as well as with decisions taken by the Conference of the States Parties or the Executive Council.

[...]

Regulation 4.4

- (a) The OPCW is a non-career organisation. This means that no permanent contracts shall be granted. Staff members shall be granted one of the following types of temporary appointments: short-term or fixed-term. The initial contract period shall not normally exceed three years. Contract extensions are possible; however, contracts, including extensions, carry no expectation of renewal or re-employment. Contract extension will become progressively more difficult, and shall be assessed upon, inter alia, the staff member’s performance measured in accordance with a rigorous performance appraisal system. Any contract extension will be based on a continuing need on the part of the Organisation for the specific skill and knowledge of the staff member.

[...]

**Rule 4.4.01
Appointments**

Staff members may be granted one of the following types of appointments: short-term appointment or fixed-term appointment.

[...]

(b) Fixed-term appointment

- (i) A fixed-term appointment, having an expiration date specified in the letter of appointment, may be granted for such period or periods as the Director-General determines in light of the provisions of Staff Regulation 4.4.
- (ii) A fixed-term appointment does not carry any expectation of renewal or of conversion to any other type of appointment.

Rule 4.4.02
Expiration of appointments

- (a) All appointments shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.
- (b) Separation as a result of the expiration of an appointment shall not be regarded as a termination within the meaning of the Staff Regulations and Rules.”

5. As clearly stated by the relevant rules, the OPCW is a non-career organisation. It does not grant permanent contracts, but only two types of temporary appointments: short-term or fixed-term. A fixed-term appointment does not carry any expectation of renewal.

It is well settled in the Tribunal’s case law that an organisation enjoys wide discretion in deciding whether or not to renew a fixed-term appointment. The exercise of such discretion is subject to only limited review as the Tribunal will respect the organisation’s freedom to determine its own requirements and the career prospects of staff. However, the exercise of such discretion is not unfettered and the Tribunal will set the decision aside if it was taken without authority, or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence (see Judgments 3948, consideration 2, 4062, consideration 6, 4146, consideration 3, 4231, consideration 3, and 4363, consideration 10).

These grounds of review are applicable notwithstanding that the Tribunal has consistently stated that an employee who is in the service of an international organisation on a fixed-term contract does not have a right to the renewal of the contract when it expires and the complainant’s terms of appointment contain a similar provision (see Judgments 3444, consideration 3, 3586, consideration 6, and 4218, consideration 2).

6. The complainant alleges that the non-extension decision was tainted by an error of fact since it was taken on the assumption that his employment was the result of a “direct political appointment” by the former Director-General whereas, in reality, he was selected for the

position of Director, ICA, by means of a competitive process following the publication of the open vacancy for said position to all African delegations.

The Tribunal finds, on the basis of the relevant evidence provided by the Organisation, that the appointment of the complainant in 2016 was a direct political appointment.

Contrary to the complainant's assertion, the selection process was not preceded by the publication of a vacancy notice open to any potential candidates. The process was initiated by a letter of 9 September 2015, addressed by the then OPCW Director-General to the Permanent Representative of the Republic of South Africa to the OPCW, in which the Director-General stated that:

- the position of the Director, ICA, which was then occupied by a staff member from South Africa, would soon become vacant;
- he intended to appoint a suitable candidate from the African region to this position;
- he therefore requested the Permanent Representative of the Republic of South Africa to “inform [his] regional group to seek names of suitable candidates”;
- “[t]he candidacies [could] be submitted directly to [him] with their CVs by 15 October 2015. Following interviews that [he would] conduct, [he would] appoint the new Director ICA”.

The process, as described in this letter, was not a competitive process since there was no vacancy notice open to public competition, but only one which would enable the OPCW Director-General to select directly the suitable candidate.

Moreover, this process did not comply with either Staff Regulation 4.3, which required that selection of staff be made on a competitive basis, or Administrative Directive AD/PER/29/Rev.3, in force at the material time, whose paragraph 7 required, even for appointments to posts at the D-2 level and above, that they be based on “recruitment and selection procedures”. The Tribunal's case law holds that the consultation with “relevant delegation and regional groups” – as made in the instant

case – did not satisfy paragraph 7 of the Directive (see Judgment 4069, consideration 6).

In conclusion, the non-extension decision was not tainted by an error of fact.

7. The complainant submits that the non-extension decision was tainted by an error of law which consisted in a breach of the OPCW's legal framework on contract extensions. He asserts that according to the relevant Staff Regulations: (i) the main criterion for granting a contract extension centres upon the concerned staff member's performance evaluated through a rigorous assessment (Staff Regulation 4.4(a)); (ii) though due regard should be paid to geographical distribution when recruiting staff members (Staff Regulation 4.2), such a concern does not apply when considering contract extensions of incumbent staff members (Staff Regulation 4.4(a)); the non-extension decision was presented to him as a *fait accompli*, it was not in any way related to his performance as Director ICA (his performance had been deemed fully satisfactory during his tenure in OPCW), and therefore it was in breach of Staff Regulation 4.4(a), pursuant to which contract extensions "shall be assessed upon, inter alia, the staff member's performance", and not also upon geographical balance. The Tribunal notes that two reasons were given for the non-extension decision: (i) the intention of the OPCW to competitively recruit the new team of directors in its top structure; and (ii) the intention of the OPCW to maintain geographical balance in the top structure. In the present case, the OPCW's intention to recruit the new team of Directors in its top structure on a competitive basis was a valid and decisive reason. As a result, it is not relevant to assess whether the second reason given by the OPCW, i.e. to maintain geographical balance in its top structure, was a valid reason as well. Consequently, all of the complainant's pleas related to the OPCW's intent to maintain geographical balance in its top structure need not be addressed.

At this juncture, it must be recalled that in Judgment 2959, delivered in public before Administrative Directive AD/PER/29/Rev.3 entered into force, the Tribunal held that the decision by which the post of Chief of Cabinet had been filled without a competitive process was unlawful

pursuant to Staff Regulation 4.3, according to which “[s]o far as practicable, selection shall be made on a competitive basis”. The Tribunal also held that Staff Regulation 4.3 provided no explicit or 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.

In Judgments 3993 and 4069, delivered in public after Administrative Directive AD/PER/29/Rev.3 entered into force, the Tribunal held that this Directive, whose paragraph 7 vests in the Director-General the prerogative to make appointments to posts at the D-2 level and above and to the posts of Chief of Cabinet and Deputy Chief of Cabinet in the Office of the Director-General based on recruitment and selection procedures which differ and depart from those specified in the Directive, does not allow direct appointments. Indeed, paragraph 7 of the Directive specifies that such appointments must however be based on “recruitment and selection procedures”, whilst the consultation with the States Parties and with “relevant delegations and regional groups” did not satisfy paragraph 7 of the Directive.

It was therefore lawful, for the Organisation, to consider these precedents in making new appointments, in light of the circumstance that recruiting by competition best satisfies the Organisation’s interest. Moreover, once the Organisation had recognized the flaw in its recruitment process (i.e. direct political appointments), it was reasonable for it not to perpetuate the same mistake. Thus, it was not unreasonable to choose not to renew or extend fixed-term appointments which had been made without a competition, as was the case of the complainant’s appointment.

This reason (not to renew or extend fixed-term appointments that were originally direct appointments) was not precluded by Staff Regulation 4.4(a). The Tribunal disagrees with the complainant’s argument that under Staff Regulation 4.4(a) contract extensions must be assessed mainly on the basis of the staff member’s performance measured in accordance with a rigorous performance appraisal system.

The complainant’s assertion seems to be based on a misinterpretation of the provision, the text of which reads, in relevant part, as follows: “contracts, including extensions, carry no expectation of renewal or re-

employment. Contract extension will become progressively more difficult, and shall be assessed upon, *inter alia*, the staff member's performance measured in accordance with a rigorous performance appraisal system." The good performance of the staff member is only a requirement and not necessarily the only requirement for extension, according to Staff Regulation 4.4(a) in which the term "*inter alia*" is employed with regard to performance. Meeting this requirement is not sufficient in itself to give a right to such extension.

In conclusion, the non-extension decision was not tainted by an error of law.

8. The complainant further submits that the non-extension decision was tainted by a breach of the OPCW's procedural rules for the extension of contracts. He argues that paragraphs 3 to 5 of Administrative Directive AD/PER/28 on Contract Extensions were violated, since he was first informed of the non-renewal decision directly by the former Director-General, whilst the formal process for non-extension must be initiated by HRB; HRB did not submit a set of substantiated recommendations to the Director-General.

Paragraphs 3 to 5 of Administrative Directive AD/PER/28 read as follows:

- “3. At least six months prior to the expiry of a staff member's contract, the Human Resources Branch (HRB) will notify the director of the division or office to which the staff member is assigned, that the staff members' contract is due to expire, and requesting a recommendation as to whether or not an extension should be offered.
4. The director shall submit to HRB the recommendation within one month of such notification, and provide a copy to the staff member. All recommendations, either to extend or not to extend a staff member's contract must be properly substantiated, including by means of the relevant documentation.
5. HRB will refer the recommendation and accompanying documentation to the Director-General, who will make the decision within his discretion and in the interests of the Organisation. Such decision will take into account, *inter alia*, the criteria contained in Article VIII, paragraph 44 of the Chemical Weapons Convention, relevant provisions of the Staff Regulations and Interim Staff Rules, and the decisions of the Executive Council and the Conference of States Parties on the Tenure Policy of the Organisation.”

The process for a contract extension is initiated by HRB, which requests from the director of the division or office to which the staff member is assigned a recommendation as to whether or not an extension should be offered. Subsequently, the director shall submit to HRB his recommendation. As a third step, HRB will refer the recommendation and accompanying documentation to the Director-General, who will take the decision within his discretion.

In the instant case, it would have been inappropriate to follow this process, as it would have resulted in a manifest conflict of interest. Indeed, the complainant was the director of the division, and he would have had to submit to HRB a recommendation regarding his own contract extension. For this reason, it was appropriate that the process of non-renewal was initiated directly by the Director-General and followed by meetings between the complainant and high-level officials. It should be recalled that in July 2018 the then outgoing Director-General informed the complainant that the new Director-General would not renew his appointment. Then, on 25 September 2018, a meeting on the issue was held between the complainant, the Deputy Chief of Cabinet and the Head of HRB. A further meeting took place on 1 October 2018 between the complainant, the new Director-General and the Deputy Chief of Cabinet.

In conclusion, the non-extension decision was not tainted by a breach of the OPCW's procedural rules for the extension of contracts.

9. The complainant argues that the non-extension decision was tainted by the OPCW's contradictory conduct and misuse of authority. He says that through its conduct the OPCW contradicted both reasons given for the non-extension of his contract, as the vacancy notice for the position of Director, ICA, was not restricted to candidates from outside the African region and during 2018 and 2019 at least two new staff members were appointed directly, without a competitive selection procedure. According to him, the OPCW violated the principle of *non venire contra factum proprium* and its conduct shows that the reasons given for the non-renewal were false pretences to get rid of him.

As already stated in consideration 7 above, it is not relevant to address whether the OPCW's proffered need to maintain geographical balance in its top structure was a sound and valid reason for the non-extension decision. As a consequence, it is also not relevant to address whether the OPCW's subsequent conduct was at odds with this reason. It must also be added that the complainant was not impeded from applying for the vacancy for the position of Director, ICA, having regard to the region he came from, but he chose not to do so.

As regards the complainant's allegation that the OPCW did not curtail its former practice of direct appointments, as evidenced by the appointment in 2018 and 2019 of two staff members without a competitive selection procedure, the Tribunal notes that the two staff members mentioned by the complainant were directly appointed before the reform process in recruitment to top structure posts was initiated.

Indeed:

- the appointment process of the new Chief of Cabinet Mr B. was initiated on 18 December 2017;
- the appointment process of the Deputy Director-General Ms M. was initiated on 16 February 2018;
- on 26 June 2018 Judgment 3993 was delivered in public; this judgment set aside a direct appointment to a post in the top structure of the OPCW;
- following the public delivery of this judgment, on 15 August 2018 a fourth revision of the Administrative Directive on "Recruitment and Selection Procedures" was promulgated (AD/PER/29/Rev.4), which specifically provided for competitive recruitment to top structure and strategic posts, as well as for the publishing of vacancy notices externally;
- on 23 August 2018 a Note by the Director-General entitled "Recruitment and Selection of the Top Structure Officials" was circulated to all OPCW States Parties, informing them of actions taken by the Secretariat with a view towards reforming the recruitment and selection process on a competitive basis;

- the reasons for the non-extension of the complainant’s contract were given to him orally for the first time in the meeting of 25 September 2018 and in writing in the decisions of 3 October 2018 and 30 November 2018.

In brief, the two direct appointments referred to by the complainant took place before the public delivery, on 26 June 2018, of Judgment 3993 and the ensuing actions taken by the Administration to implement that judgment, while the decision not to renew the complainant’s contract was taken after the delivery of that judgment.

10. The complainant contends that the OPCW violated its duty of care towards him. According to him, it was the recruitment in 2018 of the new Deputy Director-General from the African region, whilst the complainant was still in service, that breached the principle of geographical balance in the top structure of the OPCW. Having regard to considerations 7 and 9 above, the Tribunal need not address any issue regarding the geographical balance. There are no other elements to substantiate the alleged violation by the OPCW of its duty of care towards the complainant. As the decision not to extend the complainant’s contract, set to expire on 21 May 2019, was communicated to the complainant in writing by a letter of 3 October 2018, the OPCW gave the complainant seven months’ notice of the non-renewal. The expiry of the contract occurred at the contractually agreed time, and the complainant received the valid reasons for the decision, both orally and in writing (see Judgment 4321, consideration 8).

11. The complainant alleges a violation of the Tribunal’s case law on “direct political appointments”. He submits that independently of the error of fact underlying the Administration’s argument that he had been appointed by means of a direct political appointment, it is notable that in the judgments in which the Tribunal found that the OPCW’s practice of directly appointing officials was unlawful, the Tribunal emphasized that “the OPCW shall shield [the staff members appointed by the Director-General without a competitive process] from any injury that may flow from the setting aside of [...] their appointments, which they accepted in good faith” (see, for example, Judgments 3993, consideration 9,

and 4069, consideration 6). The complainant further submits that in the light of the above-cited case law, even if one were to assume that his appointment was the result of a direct political appointment, the OPCW's reliance on this alleged fact to ground its non-extension decision is unlawful since the OPCW is, in any event, bound to shield the complainant from any injury which might flow from the alleged initial unlawfulness of his appointment. The Tribunal finds that the precedents cited by the complainant are not applicable to his case, as they concerned material cases of annulment of appointments accepted in good faith, and not decisions of non-renewal. In both the cited precedents, the Tribunal annulled the direct appointments but, since they had been accepted in good faith, it required the OPCW to shield the staff members whose appointments had been set aside. In the present case, the complainant's appointment was not annulled but rather reached its normal expiry date. There is therefore no basis for the Tribunal to order that the complainant be shielded.

12. Lastly, the complainant alleges a violation of the principle of equal treatment. He submits that the OPCW decided not to extend his contract based on the alleged reorganization of its top structure, while extending the appointments of two staff members who had joined the OPCW at around the same time as the complainant and who occupied comparable top structure posts at the OPCW under essentially comparable terms of reference. He contends that the decision not to renew only his contract was neither justified nor logical. This plea in substance reiterates the one already examined and dismissed in consideration 10 above and there is therefore no need for further consideration.

13. As the decision not to extend the complainant's appointment was not unlawful, the complainant's main claim to set it aside will be dismissed, as well as the claims for material and moral damages, interest, and costs.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ