

The Administrative Tribunal,

Considering the complaint filed by Mr Horst-Vincent Daniel Becker against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 17 August 2000 and corrected on 4 October, the OPCW's reply of 16 December 2000, the complainant's rejoinder of 4 April 2001, and the Organisation's letter of 24 July 2001 in lieu of a surrejoinder;

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

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

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

A. The complainant, a German national born in 1941, was recruited in 1993 by the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons in The Hague, the Netherlands, as the Head of the Budget and Finance Branch at grade P-5. His fixed-term contract was renewed on a yearly basis until 23 May 1997 when the Preparatory Commission ceased to exist and the OPCW was established. He was then accorded a three-year fixed-term contract for the same post with the OPCW, effective from 24 May 1997.

On 23 April 1998 Information Circular TS/IC/20 informed all fixed-term staff members of the Director-General's intention to extend "initial three-year appointments for an additional period of two years, provided that the staff member concerned has fully demonstrated that he or she meets the high standards of efficiency, competence and integrity required by the Convention [on the Prohibition of Chemical Weapons]" and that compliance with these standards would be determined "first and foremost" on the basis of performance appraisals. The complainant's overall performance was rated "Very Good" in his performance appraisal for the period from 2 October 1997 to 1 October 1998. In 1998 a job classification exercise was carried out for the complainant's post.

The Director-General informed the complainant in a letter of 6 October 1999 that his contract would not be renewed upon expiry, for a reason not related to his performance but rather to the belief that, in the future, an individual with "different skills and experience" would be required. The post was advertised in an international newspaper on 27 December 1999.

On 18 November 1999 the complainant requested the Director-General to reconsider his decision. In support of his request he stated the fact that he met the criteria set out in Information Circular TS/IC/20 and that he did possess the necessary skills and experience for the post as it would be developed in the future. The Director-General replied on 10 December that the decision of 6 October was maintained. The complainant wrote again to the Director-General on 22 December 1999 asking for more specific information on the future requirements of the post, as well as the reasons why the Director-General did not believe that he possessed the necessary skills and experience. The Director-General did not reply.

On 11 January 2000 the complainant filed an appeal with the Appeals Council. In its report of 18 May the Appeals Council recommended rejecting the appeal and the Director-General did so on 23 May 2000. That is the impugned decision.

B. The complainant contends that the decision not to renew his contract is illegal as it was based on "clearly false conclusions drawn from the dossier". Neither the Organisation nor the Appeals Council has been able to establish the reality of the differences between the complainant's post and the "new" one. He submits that in fact, his request for specific information in this regard was ignored by the Organisation and all the Appeals Council had to say on the issue was that since the job description for the post in question had been changed the Director-General had both

the right and the obligation to re-advertise the post. The complainant makes a two-fold rebuttal of these assertions. First, a job description for his post was issued in 1994 by the Preparatory Commission and not the OPCW, (a different organisation), and is therefore not valid. Secondly, that job description was not used as a basis for the classification of his post in 1998. In 1998 his supervisor certified the requirements of the complainant's post in a document used for the reclassification exercise; nevertheless the Organisation has argued that this was neither an official document nor an official job description. The complainant submits that there are no substantial differences between the requirements contained in this document, the duties and responsibilities performed by him, and the post as later advertised. To the extent that the new post contained different or expanded duties and responsibilities, he was either already carrying them out or had the required skills and experience. Even if it could be established that there were substantial differences, the procedure followed by the Organisation was flawed: if the advertised post was "new", then the complainant's post should have been abolished and he should have been granted all the guarantees and entitlements resulting from an abolition of post.

The complainant also argues that the impugned decision constitutes a breach of his legitimate expectations and of the principle of good faith. He clearly met the criteria set out in Information Circular TS/IC/20, and contrary to the Organisation's position, this circular was not just "a general statement subject to a whole range of qualifying factors". In addition, he cites the Tribunal's case law to support his argument that an organisation is not free to use the "natural end" of a contract to get rid of an employee; it must provide proper reasons and ensure that the rights of the employee have been respected. He submits that he has suffered both moral and financial injury.

The complainant requests the Tribunal to quash the Director-General's decision of 23 May 2000 and to award him two years' gross salary (including payment of indemnities) in material damages and an appropriate sum in moral damages. He also claims costs.

C. In its reply the Organisation submits that under the terms of the Paris Resolution the OPCW is the successor organisation to the Preparatory Commission. As there was no "legal hiatus" between the two, the 1994 post description continued to be valid.

In its opinion, there is no valid reason in law why the complainant's contract should have been renewed simply because his performance in the post "had been judged good"; past performance does not guarantee good future performance in a post with changed functions. It was within the Director-General's discretion to consider someone with a different combination of skills for the new post, and the complainant could have had the opportunity to demonstrate to an interviewing panel that he would have been the best candidate to fill the post. However, he did not submit an application even when he became aware that the post had been advertised.

It also finds no legal merit in the fact that the complainant has submitted his performance appraisal reports with his complaint, as his non-renewal of contract was not based on his performance in the former post. The fact that he performed well during the period 1993-1999 does not mean that he would have been the best person to carry out the expanded and more complex duties and responsibilities of the new post. Although his skills were suitable at the time, they would not have been suitable in the future. The Director-General was looking for someone "more familiar and pro-active with up-to-date budgetary and innovative finance concepts" and it was within his discretion to decide that this did not describe the complainant.

The OPCW submits that the complainant has not proven that there was any arbitrary use of authority or any other error which would allow the Tribunal to exercise its power of review. Furthermore, there has been no breach of his legitimate expectations nor the principle of good faith: the circular in question did not prescribe any law, nor did it represent a contractual promise. It merely stated the Director-General's intention, subject to certain factors.

The Organisation, contending that the non-renewal of contract was not illegal, submits that the complainant has suffered no moral or material injury.

D. In his rejoinder the complainant argues that the OPCW has failed to rebut his contention that the impugned decision was based on false conclusions drawn from the dossier. It did not establish that the 1994 job description reflected the complainant's tasks nor did it prove that he did not meet the requirements of the "alleged new post". It has also failed to demonstrate any substantial differences between the two posts. Therefore, the Director-General's decision constitutes a misuse of authority. The complainant provides examples of projects he has been involved in to prove that he is, indeed, "pro-active" and "innovative".

He presses his arguments that there were indeed breaches of his legitimate expectations and the principle of good faith.

E. In the letter the OPCW submitted in lieu of a surrejoinder it contends that the examples of projects given by the complainant in his rejoinder proves only that he has been involved with certain projects in the Organisation, but not that the initiative for implementing changes has come from him; he has failed to discharge the burden of proof. It denies that the complainant had any legitimate expectations of contract renewal: the OPCW is a "non-career organisation" and fixed-term contracts carry no expectation of renewal.

CONSIDERATIONS

1. At the material time the complainant was the Head of the Budget and Finance Branch in the OPCW, under a three-year fixed-term contract. By a letter of 6 October 1999 the Director-General notified the complainant that his contract would not be renewed, not for reasons related to his past performance but because different skills and experience would be required for the post in the future. The Director-General said he planned to expand the scope and responsibilities of the position of the Head of the Budget and Finance Branch and to re-advertise the post. In a letter of 18 November the complainant requested the Director-General to reconsider this decision and to grant him an extension for at least one year to give him a chance to prove himself. But the Director-General rejected his request.

2. The complainant appealed against the decision not to renew his contract. The Appeals Council recommended that the decision be maintained and by a letter of 23 May 2000 the Director-General reconfirmed his decision.

3. The complainant impugns that decision. He does not dispute that a decision not to renew a contract is a discretionary one, but he contends that false conclusions have been drawn from the dossier and that the decision was taken in breach of his legitimate expectations and of the principle of good faith.

4. He refers to a request for classification action submitted in February 1998 in which a new assessment of his functions was made, showing changes which either were not included in the 1994 job description or had not the same importance at that time. His post was not reclassified.

5. He also refers to an information circular dated 23 April 1998 in which the Director-General said it was his intention to extend "initial three-year appointments for an additional period of two years, provided that the staff member concerned has fully demonstrated that he or she meets the high standards of efficiency, competence and integrity required by the Convention [on the Prohibition of Chemical Weapons]". Staff members' compliance with these standards would be determined on the basis of performance appraisals in accordance with the Organisation's performance appraisal system.

6. The complainant contends that the Director-General mistakenly concluded from the dossier that the post was new and that he was not competent to meet the new requirements: the post advertised was not a new one. The 1994 job description did not reflect his real tasks. The real functions of his post were described in the classification request submitted in February 1998. He considers that there are no substantial differences between his post as set out in that request, the duties and responsibilities he actually performed, and the post which was later advertised.

7. He explains that the experience required for the new post, thirteen years, is not a substantial difference since his supervisor said in 1998 that his post required fifteen years experience. The 1994 job description required ten years experience. He adds that his post was clearly management oriented, which can be seen from the classification request and his performance appraisal report from October 1997 to October 1998. Furthermore, his post called for performance of budgeting as seen in the classification request. If the post was a new one, then his post should have been abolished thus giving him entitlements. He says that the Director-General failed to give reasons for his belief that the complainant did not possess the necessary skills for the future requirements of the post.

8. The complainant argues that he had a legitimate expectation of renewal because in the circular of April 1998 the Director-General stated his intention to extend initial three-year appointments for two years and that compliance with the required standards would be based on performance appraisals. There is no contesting that the complainant's performance appraisal was very good. He sees the failure to follow the information circular as a breach of good faith.

9. He seeks the quashing of the Director-General's decision, and two years gross salary plus allowances, moral damages and costs.

10. The Organisation replies that the Director-General had the discretionary authority to consider someone with a different combination of skills for the new post. The complainant was free to apply and demonstrate to the interviewing panel that he was the best candidate for the post. He did not do so.

11. It argues that the decision not to renew an appointment is discretionary, and can only be challenged in circumstances defined by the case law. None of these circumstances applies and the complainant has not shown that there was any abuse of authority. The Director-General was not required to take into account the complainant's performance appraisal since the case was a clear case of non-renewal of a contract coming to its natural end. The Director-General decided, in the overall interests of the Organisation, not to renew the contract, to redefine the post with different skills and experience requirements, and to re-advertise it. In those circumstances, a consideration of the complainant's performance appraisal was not relevant.

12. The OPCW states further that, as Interim Staff Rule 4.4.01 provides that a fixed-term appointment does not carry any expectation of renewal or of conversion to any other type of appointment, expectancy does not arise where a post is being abolished. The information circular was a general statement of intent and cannot be construed as a promise made to every staff member. The decision not to renew the complainant's contract was not in breach of good faith.

13. Article VIII, paragraph 44, of the Chemical Weapons Convention gives responsibility to the Director-General for the appointment of the staff, as well as the organisation and functioning of the Technical Secretariat, and states more particularly:

"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."

14. The Director-General, in exercise of his discretionary authority and taking into account the overall interests of the Organisation, decided that the post of the Head of the Budget and Finance Branch should be redefined and that the complainant's contract should not be renewed.

15. The Tribunal accepts that the Organisation was entitled to adapt to changes and to modify the job description for the given post in view of the Organisation's future needs. In such circumstances, the consideration of the complainant's performance appraisal was not necessary.

16. The Tribunal notes that Interim Staff Rule 4.4.02(b) provides that 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 Interim Staff Rules.

In addition, Rule 9.1.01(b) defines termination within the meaning of the Staff Regulations and Interim Staff Rules as any separation initiated by the Director-General, other than the expiration of a contract.

Therefore, the question of any termination indemnity payable to the complainant does not arise.

17. In support of his argument that the new post is no different from his own, the complainant contends that his post was clearly management oriented and also called for performance of budgeting. However, this involves an appraisal of the needs of the Organisation, which is the prerogative of the Director-General. It is within his discretionary authority to take decisions accordingly. The complainant has not proved that there was any flaw in the decision.

18. The information circular of April 1998 did not amount to a promise on which the complainant could rely. It was a statement of intent but could not be construed as applying to all posts. In the case where the complainant's post was redefined there could be no legitimate expectation that the complainant would be appointed to the new post. The extent of the new duties and responsibilities in the post required re-advertising it. The complainant was free to apply and demonstrate that he was the best candidate for the new post. He failed to do so.

19. Since there was no promise involved, there was no breach of good faith.

20. The conclusion is that his main claims must fail, and so must his claim to damages.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

Mella Carroll

Florida Ruth P. Romero

Catherine Comtet