

NINETY-SEVENTH SESSION

Judgment No. 2324

The Administrative Tribunal,

Considering the complaint filed by Mrs E. C. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 5 March 2003 and corrected on 20 June, the OPCW's reply of 25 August, the complainant's rejoinder of 1 December 2003, and the Organisation's surrejoinder of 9 February 2004;

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

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

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

A. The complainant, a French national born in 1954, joined the OPCW on 7 August 2000 as Head of the Budget and Finance Branch at grade P-5 under a three year fixed-term contract. Her designated supervisor was the Director of Administration. Following a decision not to renew her contract she was separated from service on 13 November 2003.

On 17 July 2001, in a mid-point performance review for the year 2001, the Deputy Director-General, acting as Director of Administration, indicated that the complainant fully met performance expectations. A new Director of Administration was recruited and took up his duties on 16 August. In a memorandum of 5 September he reminded the complainant that for a "clear chain of command" he must "understand, agree and approve correspondence" that is sent from his Division to the Office of the Director-General, which he referred to as the "Front Office". The situation and communication between the Director of Administration and the complainant degenerated. Further to a meeting between the two on 7 December, the Director informed her by a letter dated 12 December 2001 that she was being placed on special leave with pay until further notice, while her case was reviewed. As reason for this measure he mentioned his dissatisfaction with the complainant's performance, including her failure to carry out instructions, her failure to observe procedures regarding the release of official information, and her inability to work harmoniously with staff. Subsequent correspondence from the Director to the complainant emphasised that the decision to place her on leave was to enable a review of her performance, not to enable disciplinary action to be taken.

On 5 February 2002 the complainant requested the then Director General to review the decision of the Director of Administration to place her on special leave with pay. She said that the decision was illegal because it was taken *ultra vires*; she added that the reasons given by the Director of Administration were not warranted, affected her dignity and good name, and caused her unnecessary harm. She considered the decision to be part of a moral harassment. The Director-General informed her on 6 March that he hoped to take a decision on her request the following week. Hearing nothing after that time, on 3 April the complainant submitted an appeal to the Appeals Council against the decision by the Director of Administration to place her on special leave with pay.

On 3 May 2002 the Deputy Director General informed the complainant, in his capacity as Acting Director General, that he was considering the termination of her appointment under Staff Regulation 9.1(a) and that a Special Advisory Board had been established to report on the matter. The Board first reported on the matter on 12 July, finding that the Organisation had not provided sufficient grounds to support termination of the complainant's contract. The Acting Director General requested the Board to revisit its findings. The Board reconvened on 17 September and on 23 September sent the new Director-General, who had been elected on 23 July, a written summary of its meeting. In this summary the Board stated that it had found no reason to change its findings and it expressed surprise that the Administration had not yet solicited the complainant's version of events.

On 1 November 2002 the Director of Administration informed the complainant that the Director-General had decided that she should resume her duties as from 6 November.

In its report dated 15 November 2002 the Appeals Council considered that the decision to place her on special leave with pay had been taken by the Director of Administration, who lacked the authority to do so. However, the Council felt that “under the circumstances in place within the Organisation at the time, the placing of the [complainant] on special leave with pay may have met the criteria of being an action taken in an exceptional case”. Nevertheless, it determined that the decision affected the complainant’s dignity and good name. The complainant was sent a copy of that report under cover of a letter dated 9 December 2002, in which the Director-General informed her that since she had been reinstated as from 6 November, he considered her case to have been satisfactorily resolved. That is the decision she impugns.

B. The complainant states that the illegality of the decision by the Director of Administration cannot be questioned and that it was in recognition of this fact that the Director-General had reversed the decision and reinstated her. She alleges that the decision had allowed the Director of Administration complete control of budgetary issues, letting him disclose inaccurate financial statements; it also slowed down an investigation process on the mismanagement of the Provident Fund.

Even though the Appeals Council did not find in her favour, she notes that it did find that her dignity and good name had been affected. She submits that there was non-compliance with the duty to compensate her for the injury she has suffered. The Tribunal has consistently held that an administration should have care for the dignity and reputation of staff members, and not cause them unnecessary personal distress. It also has held that an organisation is under an obligation to redress any harm caused to a staff member. She provides details of the injury she suffered.

The complainant contends that the OPCW failed in its duty to protect her against moral harassment by her superior. She states that the Director General was fully aware that to reinstate her under the supervision of the Director of Administration would place her in a difficult situation. However, he took no steps to protect her. And, in fact, the harassment continued after she returned to her duties.

She asks the Tribunal to set aside the impugned decision, to award her moral damages equal to three years’ gross salary, reimbursement for her costs for the internal appeals procedure, and costs before the Tribunal.

C. In its reply the Organisation says that the complainant had been repeatedly warned and given clear directions from the Director of Administration, but that she continued to disregard the authorisation or clearance process. It alleges that all three officials that had served as her supervisor had kept the Director General “fully informed” of their concerns about her. Finally, the Director-General had decided that the complainant’s situation needed to be reviewed and that, in the interest of the Organisation, she should be placed on special leave with full pay pending the review of her case. Therefore, he “instructed and duly authorized” the Director of Administration to take appropriate action in that regard. It maintains that the decision was taken so that her performance could be reviewed; she only partially met performance expectations in 2001. The Organisation challenges the complainant’s version of some of the facts.

It also says that the Director-General’s decision of 9 December 2002 was not a substantive one lending itself to a complaint before the Tribunal. Since he had already reversed the decision placing her on special leave with pay, it was nothing more than a decision not to decide a second time to review it. As she no longer had a cause of action, the Tribunal is not competent to hear her complaint. In addition, that decision addressed the issue of the special leave with pay, but it says that there was “no other specific request” from the complainant on which the Director-General should have taken action. It denies that she has suffered any injury by the decision to place her on special leave with pay.

It contends that the Director-General had verbally authorised the Director of Administration to communicate the decision in question to the complainant, and that “it would be unthinkable” for the Director of Administration to have placed a senior official on special leave with pay without the Director-General’s consent. Interim Staff Rule 5.3.01(a) permits the Director-General, under exceptional circumstances, to place a staff member on special leave with either partial or full pay. Her case was considered exceptional.

D. In her rejoinder the complainant refutes the OPCW’s arguments. She points out that she continually stated that the decision caused her harm, and thus a claim for damages in that respect is receivable. She points out that the

Special Advisory Board has concluded in its first and second reports on the matter that there were insufficient grounds to terminate her contract. When the Acting Director-General received the first report he pressured the Board to change its findings. The Board reconvened two months later to review the issue and confirmed its earlier conclusions in the report it sent to the newly elected Director-General.

She presses her pleas that the decision to place her on special leave was illegally taken by the Director of Administration, and she refutes the OPCW's arguments concerning the receivability of her complaint. Moreover she says the Tribunal is indeed competent to hear her complaint. She argues that the decision to place her on special leave was not justified. The Organisation did not respect her dignity and she is therefore entitled to moral damages.

She notes for the Tribunal that she recently received a revised report of the Rebuttal Panel set up to review her performance appraisal report for the year 2001. The Panel unanimously concluded that she had fully met performance expectations and her performance appraisal was to be changed to reflect this decision.

E. In its surrejoinder the OPCW submits that the reports of the Special Advisory Board and the Rebuttal Panel established to review the complainant's performance appraisal are irrelevant to the case at hand, which concerns the decision to place the complainant on special leave with pay.

It presses its arguments against the receivability of the complaint, and it reiterates that the Tribunal is not competent to hear the complaint. It says that the complainant has failed to identify what "express decision" she is impugning. The Organisation rejects her pleas on the merits.

CONSIDERATIONS

1. The complainant contests the Director General's decision contained in a letter of 9 December 2002 insofar as it did not grant her compensation following the Appeals Council's finding that the decision to place her on special leave with pay "did indeed affect [her] dignity and good name".

In his letter informing the complainant of the findings of the Appeals Council and of his decision on her appeal the Director General stated:

"In light of all the facts and circumstances of the case, including the fact that you were paid your full salary throughout the period, and my previous decision to reinstate you in active duty, I consider your case as having been satisfactorily resolved. There is thus no need for any further action. This constitutes the final decision on your appeal, in terms of Interim Staff Rule 11.2.03 (n)."

2. It is contended in the complaint, as it was before the Appeals Council, that the decision to place the complainant on special leave with full pay was illegal and resulted in prejudice in respect of which the OPCW has a duty to compensate her. Additionally, it is claimed that the decision was part of a campaign of moral harassment which continued after she was reinstated and in respect of which the OPCW also had a duty to protect her. She seeks to have the decision of the Director General of 9 December 2002 set aside and claims compensation in an amount equal to three years' net salary. Further, she seeks costs in respect of these proceedings and those before the Appeals Council.

3. By its reply and surrejoinder, the OPCW submits that the Director General's decision of 9 December 2002 was not "a substantive decision or a decision properly so called" and that, accordingly, this Tribunal lacks jurisdiction to entertain the complaint. Further, it is argued that, in seeking compensation and costs, the complainant is advancing a claim that was not made in her request for review or in the internal appeal and, in consequence, the complaint is irreceivable. Moreover, the OPCW contends that the decision to place the complainant on special leave was lawful and justified and denies that she was the victim of moral harassment.

Jurisdiction

4. The OPCW correctly contends that, by force of Interim Staff Rule 11.3.01(a), a staff member may only appeal to this Tribunal against "administrative decisions and disciplinary actions". However, it is not correct in its contention that the decision of 9 December 2002 was "nothing more than a decision [...] not to decide a second time on the Complainant's request for a review of the decision to place her on special leave with pay [which] had already [been] reviewed [...] and [...] reversed".

5. As is clearly recognised in the Director-General's letter to the complainant of 9 December 2002, the decision then made by him was to take no further action beyond her reinstatement to active duty because, in his view, the matter had been "satisfactorily resolved". And he himself characterised the decision as a "final decision" on her internal appeal.

6. It is not in doubt that the quashing or reversing of a decision may result in that decision being deprived of all legal consequences or effects. That is the case, for example, where a decision to withhold an automatic salary increment is reversed with effect from the date on which the increment would otherwise have been payable. In a case of that kind, the subsequent decision deprives the person concerned of a cause of action. And if there is no cause of action when a complaint is filed with this Tribunal, the complaint is, on that account, irreceivable. So much is clear from Judgments 1431 and 2065. But the mere fact that a final and substantive decision has been reversed or withdrawn does not deprive the previous decision of its character as a final and substantive decision. To the extent that the OPCW contends otherwise, its argument must be rejected, as must its argument that the decision of 9 December was not a substantive decision because it was merely a decision not to review again the decision to place the complainant on special leave with full pay.

Receivability

7. The argument that the complaint is not receivable is closely related to the argument that the decision of 9 December 2002 is not, strictly speaking, a decision. In this respect, the OPCW contends that the complainant did not at any time seek relief other than review of the decision to place her on special leave. It should at once be noted that the word "review" is not restricted in meaning to "withdrawal" or "reversal". A request for "review" is wide enough to encompass a request for compensation if the decision in question or its effects cannot be entirely undone by withdrawing or reversing that decision. That aside, the complainant's request for review was for review with the purpose of restoring her dignity and, in her internal appeal, she sought "compensat[ion] for all the damages suffered", albeit on the assumption that she could not be reinstated in her previous position.

8. In a context in which the complainant was contending that the decision to place her on special leave was illegal and was, moreover, part of a campaign of moral harassment, and in which she expressly sought to have her dignity restored, her request for review extended to encompass a claim for compensation unless some other means was suggested by which her dignity could be restored. That is all the more so because the consequences of the decision could not be undone merely by reversing it. Accordingly, to the extent that the complainant seeks compensation with respect to the decision to place her on special leave, the complaint is receivable. However, her claim for costs of the internal appeal proceedings was made for the first time before the Tribunal. That being so, that part of her claim is not receivable.

9. Somewhat different questions arise with respect to the contention that the complainant was the victim of moral harassment which continued after her reinstatement. Contrary to the submissions of the OPCW, matters subsequent to the decision to place the complainant on special leave may throw light on the motive with which that decision was taken and are, to that extent, matters that may properly be taken into account. However, it was only the decision to place her on special leave which was the subject of the internal appeal proceedings and, thus, the claim of moral harassment can only be entertained to the extent that matters on which that claim is based are relevant to explaining that decision.

Lawfulness

10. It is not now in issue that, pursuant to Rule 5.3.01, only the Director General had authority to place the complainant on special leave with full pay and that such a decision could only be taken in "exceptional cases" and "in the interest of the Organisation". The primary issue is whether the decision was made by the Director General and not, as found by the Appeals Council, by the Director of Administration.

11. The OPCW asserts that the Director-General made the decision in question and instructed the Director of Administration to take appropriate action in that regard. However, no file note or other evidence is advanced in support of that assertion. Moreover, the evidence before the Tribunal is all the other way. In this regard, it was the Director of Administration, not the Director-General, who wrote to the complainant and informed her that he was "placing [her] on special leave with pay until further notice". That letter contains no reference whatsoever to the Director General or to any discussions with the latter. And although, in her request for review, the complainant

expressly contended that the Director of Administration had taken the decision in question, the Director-General did not say anything to the contrary in his reply. Rather, he referred simply to “the decision to place [her] on special leave with pay”. That correspondence gives rise to the very strong inference that the decision was taken by the Director of Administration and not by the Director General.

12. The Organisation submits that the inference that the Director of Administration and not the Director General decided to place the complainant on special leave with pay should not be drawn because the complainant has not asked for an oral hearing in which the former Director-General could give evidence. That submission is misconceived. It has at all times been within the power of the Organisation to take steps to ascertain the role, if any, of the Director General in the decision in question and, in the absence of any evidence from it to the contrary, the inference must be drawn that the decision was made by the Director of Administration and not by the Director-General. Accordingly, the decision was unlawful.

Compensation: Improper motive

13. A decision to place a senior officer on leave with or without pay pending a review of his or her performance is one that inevitably affects that person’s dignity and good name and, moreover, it is one that will almost certainly carry adverse consequences for his or her career. Where, as here, the decision is unlawful, the person concerned is entitled to compensation. However, the measure of compensation may vary according to whether, on the one hand, the decision might otherwise properly have been taken in the circumstances or, on the other, whether it appears to have been taken for an improper purpose.

14. Some unsatisfactory aspects of the complainant’s performance had been noted prior to the appointment – on 15 August 2001 – of the Director of Administration who later placed her on leave. Indeed, on 7 July 2001, the then Director General had written to the complainant expressing concern that she had not implemented an instruction but, instead, “continue[d] raising new issues and misrepresenting agreements already reached, thus delaying the start of essential work on the budget”. This notwithstanding, on 17 July, in a mid-point review of the complainant’s work, the Deputy Director General, who was then her supervisor, recorded that he was satisfied with her work “which fully [met] performance expectations”.

15. It appears that shortcomings previously noted in relation to the complainant’s performance, including the failure to follow instructions, continued after the appointment of the Director of Administration. Thus, on 5 September, he wrote to her stating:

“Let me remind you that for clear chain of command, and for the sake of good order and discipline I insist that I understand, agree and approve correspondence coming from my Division that ends up in the Front Office.”

He complained on subsequent occasions that the complainant had provided figures to the “Front Office” without his review and approval.

16. Matters appear to have reached a climax on 6 December when the Director of Administration received a copy of a revised estimate of staff costs. That resulted in an e-mail from the Director of Administration. It was not contended in that e-mail that the complainant had distributed the revised estimate without his authority, but that it “emanate[d] from the guidance and revised assumptions that [she had] lately established in calculating these costs”. The e-mail concluded:

“I have asked you on several occasions to not issue documents [...] which I cannot justify, agree with, or have not been approved.”

The following day the Director of Administration informed the complainant that she was being placed on special leave and he confirmed that in writing on 12 December 2001.

17. One other matter should be noted. It is clear that, during the period leading to the decision to place the complainant on leave, the OPCW was in a state of financial crisis and that that situation had resulted in great concern to Member States. Doubtless, it was in the interest of the OPCW that information provided to the “Front Office” and to Member States be accurate. If it was necessary to place the complainant on leave either to bring about a situation of financial stability or to ensure the accuracy of budgetary or financial information, it might well be concluded that the case was exceptional and that it was in the interest of the Organisation to take that course of action.

18. The Director of Administration's concern seems not to have been directed to the complainant's role in providing accurate information or in ensuring, as far as possible, the financial stability of the OPCW, but to controlling the flow of information and maintaining control over the day to day workings of the Budget and Finance Branch. Even assuming this to have been a necessary concern in the then difficult circumstances, it by no means follows that those concerns could not have been remedied by measures other than placing the complainant on special leave. There is nothing to suggest that less drastic measures, such as regular discussions with the complainant, more effective procedures for supervision, reorganisation of responsibilities or, even, placing her in a different section were ever considered. In this last regard, it may be noted that there were other sections involved in financial planning and management and the complainant had earlier expressed an interest in being transferred to one of them and was, in fact, transferred to that section some time after her return to duty. Given that no consideration appears to have been given to alternative measures of the kind mentioned, it is impossible to conclude that the course taken was necessary to control the flow of information or the day to day workings of the Budget and Finance Branch. Much less is it possible to conclude, without evidence that there were no available alternatives, that the action of placing the complainant on special leave with full pay was in the interests of the OPCW.

19. There is no doubt that, in the relatively brief period between the appointment of the Director of Administration in August and his decision to place the complainant on special leave in December, there was, as stated in the Appeals Council's report, "a breakdown in relationship". There appears to have been little face to face contact between the Director of Administration and the complainant and the correspondence which emanated from the former exhibits signs of authoritarianism of a kind not ordinarily to be expected on the part of a supervisor in his dealings with a senior officer. On the other hand, the correspondence forwarded by the complainant to her supervisor exhibits a determination to justify her position, albeit in polite but forceful terms.

20. Given the absence of evidence to suggest any consideration of alternative measures and the authoritarian tone of the Director of Administration's communications with the complainant, it is clear that, whatever the initial cause of tension between them, the situation had developed into one of open hostility on his part by early December. There is a strong inference available that, despite his duty as her supervisor to have regard for the complainant's welfare, his decision to place her on special leave was the result of that hostility and not concern for the interests of the OPCW.

21. To a considerable extent, the inference that the Director of Administration's decision to place the complainant on special leave was motivated by hostility or ill will is borne out by subsequent events. As previously mentioned, the Director of Administration repeatedly informed the complainant that she had been placed on special leave to permit a review of her performance. If that had been the real reason, it would be reasonable to expect that that review would have been carried out with some expedition and would have been directed to the question whether the information that had emanated from the Budget and Finance Branch was accurate and reliable. Instead, the only review that appears to have been conducted was the normal end of year appraisal. The Director of Administration's comments on her performance were provided to the complainant at the end of February but the report was not completed until the Deputy Director-General appended his comments in late April.

22. The comments made by the Director of Administration in the performance appraisal report asserted that there had been inaccuracies and mistakes in various of the complainant's calculations but he was concerned, in the main, with specific matters relating to her failure to channel information through him. The Deputy Director-General, who had earlier reported in the complainant's mid point review that her performance met expectations, noted matters relating to his inability to understand her approach and, also, to the flow of information. He justified his change of mind with respect to the complainant's performance on the basis that "the current combination works much better than the previous one, and [...] overall, the level of service [...] is now much higher". In the result the complainant was rated as "partially meet[ing] performance requirements", a rating that was later the subject of successful proceedings by her before the Rebuttal Panel.

23. Given the "partially meets performance requirements" rating in the performance appraisal report concluded in late April 2002, one might reasonably have expected that, if the decision to place the complainant on special leave had been related to her performance, consideration would then have been given to whether she could have been offered employment in some other area of financial management within the OPCW. Instead, steps were taken in early May to have the complainant's contract terminated, not on performance grounds, but on grounds of her integrity. Specifically, it was claimed that she had not fully disclosed her previous employment history with the

Organization for Security and Co-operation in Europe. The matter was referred to a Special Advisory Board of the OPCW, it being said in the reference that the failure to make full disclosure was “calculated to mislead” and that the complainant was “untruthful and evasive”.

24. The Board reported in July that the submissions of the OPCW did not contain “sufficient grounds to support a termination” of the complainant’s contract. That report was not provided to the complainant. More significantly, no steps were then taken to review the decision to place her on special leave. Instead, the OPCW requested the Board to reconsider its report and to consider whether, because of her “lies and deception”, the complainant had disqualified herself from being an international civil servant. The Board reported on 23 September 2002 that it found no reason to review its original advice and that it considered the request to review the complainant’s suitability for appointment as an international civil servant “inappropriate”. It also observed that “the Board finds it surprising that the Management or Administration has still not conducted any interviews with [the complainant] in order to hear her version of events”.

25. Although the first report of the Special Advisory Board was not provided to the complainant, it seems that steps were eventually taken to review her situation. In any event, the Director of Administration arranged to meet her on 16 October when he informed her that he would not recommend her reinstatement. On 1 November 2002, however, she was informed that the Director-General had decided that she should resume duty on 6 November.

26. The failure, until October 2002, to review the complainant’s position strongly supports the conclusion that, contrary to what the Director of Administration had repeatedly told her, she was placed on special leave for a reason other than to enable a review of her performance. The events relating to the attempt to have her contract terminated and to have her declared unfit to be an international civil servant reinforced the inference that hostility and ill will was the real motive for placing her on special leave with pay in December 2001.

27. As the only issue before the Tribunal is that concerning the decision of the Director-General not to take any action, beyond reinstating her, with respect to the decision to place the complainant on special leave, it is not necessary to consider whether the initial decision was part of a campaign of moral harassment. It is sufficient to say that it was actuated by hostility or ill will and was thus taken for an improper purpose. It was a decision which harmed her dignity and good name and should have resulted in substantial compensation. Accordingly, the Director General’s decision to take no further action involved an error of law and must be set aside.

28. Bearing in mind that the decision to place the complainant on special leave with full pay did not result in loss of salary and that the complainant’s dignity and good name were, to some extent, restored by the decision to reinstate her and will, to some further extent, be restored by this decision, the Tribunal sets the compensation that the OPCW should pay to the complainant at the sum of 25,000 euros.

DECISION

For the above reasons,

1. The decision of the Director-General of 9 December 2002 to take no further action beyond reinstating the complainant is set aside.
2. The OPCW is ordered to pay the complainant compensation in the sum of 25,000 euros.
3. It shall pay her costs in the amount of 3,000 euros.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 14 May 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 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.