

NINETY-SEVENTH SESSION

Judgment No. 2373

The Administrative Tribunal,

Considering the complaint filed by Mr A. M. O. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 5 August 2003 and corrected on 17 September, the Organisation's reply of 21 November 2003, the complainant's rejoinder of 28 January 2004 and the OPCW's surrejoinder of 20 February 2004;

Considering Article II, paragraph 5, 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 British national born in 1966, is a former official of the OPCW. He was recruited by the Preparatory Commission for the OPCW in 1995 and worked under a series of short-term contracts until November 1997, when he was granted a three-year fixed-term contract as a Network and Systems Associate Officer, at grade P-3, in the Information Systems Branch (ISB). This contract was extended from 10 November 2000 for a period of two years.

As from October 2001, at the request of the Head of ISB, the complainant took on the functions of Acting Head of the Network and Systems Section pending the recruitment of a new incumbent for that post, whilst continuing to perform the duties attached to his own post. In February 2002 he assumed a third role as System Administrator in the absence of the incumbent of that post. The complainant consistently obtained positive performance appraisals during these periods.

In April 2002 the Organisation appointed a new Acting Head of ISB, Ms P., whose opinion of the complainant's performance was less favourable. In June 2002 she suggested to her own supervisor, the Director of Administration, that the complainant's contract should not be renewed on expiry.

In July 2002, following a recommendation of the Contract Extension Board (CEB), the Acting Director-General informed the complainant that his contract would not be renewed beyond its expiry date of 9 November 2002, because his post was to be restructured with different duties. The complainant was then placed on special leave with full pay from 16 September 2002 until the end of his contract and his access to the Organisation's facilities was withdrawn.

By a letter of 19 September 2002 to the Director-General, he filed a request for review of the decision not to renew his contract. When he went to the OPCW's premises in order to hand in his request for review, he was escorted at all times by a security guard. The complainant considered this treatment to be an affront to his dignity and wrote to the Director-General to complain, but he received no reply.

Having been informed by the Acting Head of the Human Resources Branch, in a letter of 17 October 2002, that the Director-General had decided to reject his request for review, the complainant lodged an appeal with the Appeals Council on 20 November 2002. The Council recommended that the decision not to renew his contract should stand, as a valid exercise of the Director-General's discretion in the matter. However, it also recommended recognition of the moral damage suffered by the complainant as a result of the way in which his special leave had been implemented. By a letter of 15 May 2003 the Acting Head of Human Resources informed the complainant that the Director-General had decided to accept the Council's recommendation to maintain the non-renewal of his contract, but that he rejected its recommendation on the issue of moral damage. That is the impugned decision.

B. The complainant contends that the impugned decision was vitiated by abuse of authority, in that the reason put forward by the OPCW to justify the non-renewal of his contract was false. The “true” reason had nothing to do with the Organisation’s best interests. He draws attention to the fact that Ms P. had held the position of Acting Head of ISB for little more than a month when she criticised his performance and recommended that his contract should not be renewed. He asserts that she was prejudiced against him and wanted to get rid of him. He describes the recommendation by the CEB as inherently inconsistent, because although the non-renewal of his contract was not based on unsatisfactory performance, he was said to lack the necessary skills and experience for performing the functions of “his post”.

He also argues that the impugned decision was based on clearly false conclusions drawn from the facts. Noting that his performance during the period when he had simultaneously accomplished the duties of three posts had been highly rated, he submits that it is inconsistent to argue that he was competent to take on the functions of Acting Head of the Section yet not competent to act as deputy to the Head of Section as required for the restructured post.

Lastly, the complainant contends that the impugned decision was taken in breach of due process of law. He considers that since the decision was adverse to his interests, he ought to have been informed of the basis of the decision and given the opportunity to present his views. In particular, he submits that the documents relied on by the CEB in making its recommendation should have been disclosed to him. He also criticises the CEB for failing to provide sufficient reasons for its recommendation, thereby preventing the Director-General from making an informed decision, and expresses doubt as to whether the CEB was properly constituted in this instance.

He asks the Tribunal to set aside the impugned decision and to order the Organisation to pay him two years’ gross salary in compensation for his financial injury, 50,000 euros in moral damages, 9,777.30 euros in costs for the internal appeal proceedings and a further award of costs in respect of the present proceedings.

C. The Organisation replies that the impugned decision was taken by the Director-General in the exercise of his discretion and that none of the flaws on the basis of which the Tribunal may set aside a discretionary decision has been shown to exist in this case.

It rejects as speculation the complainant’s arguments as to the “true” reason for the decision not to renew his contract, and points out that the impugned decision was made by the Acting Director-General on a recommendation of the CEB, to which an initial recommendation had been submitted by the Director of Administration. As Acting Head of ISB, Ms P. had no authority in such matters.

The defendant observes that the decision to redefine the functions of a post is the prerogative of the Director-General, to whom a recommendation is made by the relevant programme manager. It is also within the prerogatives of the management to decide on the qualifications required for each post. It submits that the complainant’s good performance in his post is irrelevant to the decision “to restructure” and re-advertise that post and notes that the complainant failed to apply for the restructured post, despite the fact that it encouraged him to do so.

The OPCW also rejects the complainant’s allegations of breach of due process. Referring to the case law, it submits that since the impugned decision did not infringe the complainant’s rights, the latter did not have to be heard. It adds that the procedure followed by the CEB fully complied with the applicable rules, which do not provide for the disclosure of the documents on which it bases its decisions to the staff members concerned.

D. In his rejoinder the complainant reiterates his arguments on the merits and maintains that the impugned decision was clearly based on his allegedly unsatisfactory performance, but that since the Organisation was not in a position to invoke that reason, it resorted to the “OPCW standard reason” for such cases, namely restructuring.

E. In its surrejoinder the Organisation maintains its position on all issues.

CONSIDERATIONS

1. The OPCW appointed the complainant in 1997 as a Network and Systems Associate Officer, at grade P-3, under a three-year fixed-term contract. This contract was extended for a further two years commencing 10 November 2000. The complainant is challenging a decision of the Acting Director-General, dated 15 May 2003, not to renew his contract when it expired on 9 November 2002.

2. He submits that the decision is illegal because it is vitiated by abuse of authority, based on false conclusions drawn from the facts and vitiated by breach of due process of law.

3. He claims the annulment of the impugned decision, two years' gross salary in compensation for financial injury, 50,000 euros in moral damages, 9,777.30 euros in legal costs for his internal appeal and a further award of costs for the present proceedings.

4. The complainant alleges that the OPCW abused its authority because it acted for reasons extraneous to its best interests, and that the reason put forward to justify the non-renewal of the complainant's contract was not the "true" one. First, he submits that the facts establish that Ms P. had the objective of getting rid of the complainant and appointing her own team. In support of this, the complainant notes that she proposed the non-renewal of his contract just over a month after she was appointed as Acting Head of ISB. Second, the complainant asserts that there seems to be a "standard reason" in the OPCW for cases in which the non-renewal of a contract could be based neither on unsatisfactory performance nor on abolition of post, and cites Judgment 2092 in support of this. Third, the complainant submits that the reason given by the Director-General for justifying the non-renewal of the contract cannot be the true reason. That is, it cannot be reasonably held that the complainant, who exceeded performance expectations in his capacity as Acting Head of the Networks and Systems Section, does not possess the skills and experience to perform the lower functions as deputy to the Head of Section. The complainant also notes that the staff member selected to replace him in what was a P 3 post held a lower grade, namely G-7. The complainant further alleges that there had been no substantial changes between his former post and the restructured post.

5. Lastly, the complainant submits that the procedure before the CEB was "one-sided" and that his right to be heard was not respected. Basically, he argues that the documents that were provided to the CEB, namely a standardised excerpt/fact sheet from his personnel file, and the recommendation of the Director of Administration, were not disclosed to him, that he should have been given the opportunity to comment on the Administration's position, and accordingly, that he was deprived of the possibility of knowing the reasons on which the recommendation was based. He also says that the CEB's recommendation was insufficiently motivated.

6. While it is clear that the complainant's new supervisor did not have the same high view of his qualities as did her predecessor, that is a long way from demonstrating that there has been an abuse of authority. In fact, the complainant has failed to show that the reason given for the non-renewal of his contract was not the "true" one or that the non-renewal was not in the best interests of the Organisation. Notwithstanding the complainant's allegations, it has not been shown that the reason for the decision was not the reason given to him, that is, the redefinition of the functions and responsibilities of his post, which was then re-advertised for new recruitment on a competitive basis and in accordance with established rules. The complainant was offered an opportunity to apply for the new post but declined to do so.

7. The complainant's allegation of prejudice on the part of his new supervisor is also irrelevant. The latter was entitled to raise managerial issues and make related recommendations to her own supervisor, the Director of Administration, who could make his own independent judgement. Furthermore, the decision on the non-renewal of the contract was even further removed from the complainant's supervisor, as it was made by the Director-General, on the recommendation of the CEB with the participation of the Director of Administration. The decision to redefine the functions of a post is the prerogative of the Director-General, on the recommendation of the relevant manager, and it is equally within the power of the management to determine the qualifications required for a particular post.

8. The complainant has not shown that the meeting of the CEB at which his contract was considered was not properly constituted in accordance with applicable rules. The CEB considered the recommendation of the Director of Administration, in light of the standard documentation presented. Further, there is no requirement that the documentation considered in deciding whether or not to renew a contract upon its expiry should be provided to the staff member concerned. The recommendation of the CEB was sufficiently reasoned to allow the Director-General to reach an informed decision.

9. There remains, however, the question of the Organisation's treatment of the complainant when it decided to place him on special leave and then excluded him from the building. The Appeals Council was of the view that the Organisation had acted improperly and without due regard for the dignity and respect which it owed to the complainant. The gist of the Council's findings on this aspect of the case is as follows:

“22. In the absence of an Administrative Directive regulating special leave within the OPCW Technical Secretariat, the explanation that might come to mind for the decision to place the Appellant in this administrative situation at the Director-General’s unilateral initiative ‘*in the interest of the Organisation*’ would be that his conduct might have been deemed unsatisfactory. Not only is placing an adequately-performing staff member in a situation of forced professional inactivity an injury against his or her professional dignity, but also the current understaffing of the Network and Systems Section, and even of the Information Systems Branch as a whole, would seem to have dictated the prudent use of all its human resources for as long as available. However, insofar as no disciplinary measures had been initiated against the Appellant under the Administrative Directive on Disciplinary Measures and Procedures promulgated as AD/PER/25, dated 24 June 2002, it must be deduced that the Technical Secretariat did not consider the Appellant’s conduct to have been unsatisfactory. This is confirmed in the Response of the Director General: ‘...*the Staff Rule on due process... is in the context of disciplinary measures, and this is not a disciplinary case*’.

23. The specific prohibition of access to the OPCW Headquarters imposed verbally on 19 September 2002 by the Acting Head of Human Resources after the Appellant was placed on special leave, and the Security escort imposed on the same date, when the Appellant attempted to access the building, constitute hostile and demeaning behaviour. Such actions are in no way required under Rule 3.5.01 on Special Leave, and are at loggerheads with the Respondent’s statement that ‘*this is not a disciplinary case*’. Indeed, they are actions specifically included in paragraph 7 (Suspension from duty pending investigation or disciplinary proceedings) of the Administrative Directive on Disciplinary Measures and Procedures (AD/PER/25, dated 24 June 2002). While on special leave, a staff member who has not incurred [*sic*] in actions giving rise to disciplinary procedures would reasonably expect to be treated with confidence, including on the matter of access to the non-security critical areas of the Technical Secretariat and of its computer network. [...]

10. In refusing to follow that recommendation the Director-General gave the following reasons:

“With regard to the [Appeals] Council’s statement that you have suffered moral damage and injury against your dignity, both professional and personal, the Organisation has repeatedly stated in the Respondent’s statements, that the special leave imposed upon you was in no way a disciplinary measure in itself; nor was it ‘suspension from duty pending investigation’. The measure was taken for reasons of security and confidentiality, the maintenance of which is an essential requirement of this Organisation.”

11. Without in any way denying that the OPCW, like many other international organisations, must be vigilant about matters of internal security, the Tribunal notes that neither in the impugned decision nor in its reply does the Organisation give any explanation as to why it was thought necessary to treat the complainant in such a humiliating manner. Except in the most urgent cases, the requirements of security can almost always be fully met while still respecting the rights and dignity of individuals. This is especially so where, as the Appeals Council noted, there is no breach of discipline involved and the person concerned has for many years occupied a position of trust to the Organisation’s apparent complete satisfaction. In the Tribunal’s view, the Appeals Council’s recommendation that there should be “recognition” of the moral damages suffered by the complainant in this connection was well founded. The Tribunal assesses such damages at 10,000 euros and awards the complainant 1,500 euros in costs.

DECISION

For the above reasons,

1. The complaint is allowed in part.
2. The Organisation shall pay the complainant 10,000 euros in damages and 1,500 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 21 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.