

117th Session

Judgment No. 3307

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. E. against the Organization for the Prohibition of Chemical Weapons (OPCW) on 12 January 2012, the OPCW's reply of 13 April, the complainant's rejoinder of 9 July and the OPCW's surrejoinder dated 3 October 2012;

Considering Articles II, paragraph 5, VII and VIII 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 and the pleadings may be summed up as follows:

A. On 31 August 2007 the complainant was appointed Chief of Cabinet under a three-year fixed-term appointment, which was extended up to 31 August 2011. His initial appointment was challenged in Judgment 2959, which was delivered on 2 February 2011. The Tribunal held that the decision to appoint him directly violated the OPCW's provisions which were designed to ensure a certain level of transparency and competition for all posts. Therefore, it decided *inter alia* to set aside his appointment to the post of Chief of Cabinet, without prejudice to his rights.

Pursuant to that judgment, on 17 February 2011 the complainant accepted the OPCW's offer to place him on special leave with full pay from 21 February until the expiry of his appointment on 31 August 2011. Three months later, in May, the complainant wrote to the Director-General requesting that he be granted moral damages on the ground that the decision to place him on special leave with full pay put him in a humiliating and embarrassing situation. On 27 July the complainant was informed that the Director-General considered that there was no basis on which to award him compensation, given that the decision to place him on special leave with full pay was taken in execution of Judgment 2959 and that the Director-General had done everything possible to respect his dignity.

The complainant then filed an appeal with the Appeals Council, which notified him on 13 September that, in light of Staff Regulation 11.1, it had concluded that the appeal did not fall within the scope of its mandate because he had not challenged a disciplinary measure nor had he alleged non-observance of his terms of appointment.

By a letter of 1 November 2011 the complainant was informed that the Director-General saw no reason to modify his earlier decision of 27 July. That is the impugned decision.

B. The complainant submits that the Appeals Council wrongly concluded that his appeal did not fall within the scope of its mandate. The fact that he was removed from his post for the remaining period of his appointment and that the OPCW had failed to consider other options caused him moral injury. Consequently his appeal was filed against a decision which related to his appointment and was therefore well within the Council's mandate. He also criticises the Council for having drawn that conclusion without providing any reason or explanation thereof, in violation of the Tribunal's case law according to which any decision negatively affecting an employee must be reasoned.

He contends that the Director-General refused to grant him moral damages on the basis of an incomplete consideration of facts and

erroneous conclusions. He stresses that he was “removed from his post” through no fault of his own, but merely because of the OPCW’s own failure to follow its rules in appointing him. The decision to remove him from his post and to place him on special leave with full pay was humiliating; it was an affront to his dignity and professional reputation, in particular given his senior and high-visibility position. The OPCW further failed to respect his dignity by removing him from his post abruptly and in an “unceremonious” manner. He argues that it had failed to consider any alternative methods to execute the Tribunal’s decision.

The complainant asks the OPCW to produce any documents relating to the decision to “remove” him from his post and any documents that the OPCW transmitted to its staff members or to Member States announcing – or in any way relating to – the decision to “remove” him from his post. He asks the Tribunal to set aside the impugned decision and to award him at least 300,000 euros in moral damages, plus costs. He also claims interest at the rate of 8 per cent per annum on all amounts paid to him from 21 February 2011 through the date all sums due are paid to him in full.

C. In its reply the OPCW contends that the complainant has no cause of action because the decision not to pay him moral damages does not constitute non-observance of his terms of appointment, in particular given that there was no reason to pay him moral damages. He has failed to provide evidence of any wrongdoing by the OPCW that impaired his dignity or caused him moral injury.

In its view, the Appeals Council acted in line with Interim Staff Rule 11.2.03(i) in deciding to consider its competence as a preliminary issue and legitimately concluded that the complainant’s claim was not within the scope of its mandate.

The OPCW asserts that it acted in good faith in executing Judgment 2959 and preserved the complainant’s right to dignity. It explored several possibilities with the complainant, who finally agreed to be placed on special leave with full pay. It stresses that the complainant thus continued to enjoy the same rights and entitlements,

and therefore denies that he was hastily and unceremoniously removed from his post.

In its view the complainant's request for documents is speculative and should be dismissed.

D. In his rejoinder the complainant argues that he was denied due process because the Appeals Council did not examine the merits of his appeal.

E. In its surrejoinder the OPCW maintains its position.

CONSIDERATIONS

1. The central issue that is to be determined in this complaint is whether the complainant is entitled to compensation for moral injury from the OPCW for placing him on special leave with full pay to the end of his contract, after the Tribunal determined that his appointment in the OPCW was unlawful.

2. It is seen that the OPCW removed the complainant from his post of Chief of Cabinet after the Tribunal, in Judgment 2959 of 2 February 2011, set aside the decision to appoint him to that office without a competitive selection process. When the complainant accepted the OPCW's offer of 17 February 2011 to place him on special leave with full pay from 21 February 2011 until the expiry of his contract in August 2011, this fulfilled the Tribunal's guidance, in Judgment 1315, under 11, for example, that in such circumstances, the Organization is expected to ensure that he suffered no material injury as a result of his unlawful recruitment. As far as the OPCW was concerned, by entering into that agreement, it had fulfilled all of the complainant's rights that arose from the termination. It was in May 2011 that the complainant asked the Organization to pay him moral damages, additionally. This was on the ground that the decision to place him on special leave with full pay, following from the unlawful recruitment process, humiliated and embarrassed him.

3. By letter of 27 July 2011, the Director-General rejected the request. The Appeals Council rejected the appeal on the ground that the matter did not fall within the scope of its mandate given that the complainant was not challenging a disciplinary measure nor was he alleging non-observance of his terms of appointment. Thereupon, a letter dated 1 November 2011 informed the complainant that the Director-General accepted this decision in light of his earlier decision to reject the claim for compensation on the ground that he was placed on leave with pay in execution of the Tribunal's judgment. This is the impugned decision, which the complainant urges the Tribunal to set aside and to award him moral damages and costs, with interest.

4. The complainant also asks the Tribunal to order the OPCW to produce any documents relating to the decision to "remove" him from his post. The Tribunal notes the width of the request for disclosure and observes that it is based on the hope or expectation that something might be found in a range of communications, records and documents that might show that unlawfulness occurred in his removal from office and support his case for compensation for moral damages. The Tribunal concludes that this is a speculative expedition with no clear basis and accordingly rejects it. (See, for example, Judgments 2510, under 7; 2702, under 28; and 2967, under 1.)

5. The OPCW urges the Tribunal to dismiss the complaint at the threshold, on the ground that the matter does not fall within the scope of its mandate, as the Appeals Council did. The Director-General adopted this position in the impugned decision. The OPCW submits, in effect, that the subject of the appeal and of this complaint does not fall within the mandate of the Appeals Council or of the Tribunal. This, according to the OPCW, is because the decision appealed was not concerned with the non-observance of the complainant's terms of appointment or of the provisions of the Staff Regulations and Interim Staff Rules applicable to him. On the other hand, the complainant argues that he was denied due process when the Appeals Council found that his appeal was outside the scope of its mandate and did not examine the merits of his appeal.

6. The mandate for the competence of the Appeals Council is provided in Staff Regulation 11.1. It states as follows:

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

The competence of the Tribunal is activated in similar terms by Article II(5) of the Statute of the Tribunal. This provision limits the Tribunal’s competence to complaints that allege non-observance of the terms of appointment of officials and of the provisions of the Staff Regulations applicable to them.

7. The Tribunal notes that the complainant’s appeal to the Appeals Council was against the Director-General’s decision not to pay him compensation for moral injury, which he claimed for the “removal” from his post pursuant to the implementation of Judgment 2959, without considering other options which may have kept his dignity intact. However, it is unnecessary to determine whether this matter was within the competence of the Appeals Council, as there was an agreement between the complainant and the Organization.

8. The Tribunal notes the uncontroverted statements by the OPCW that within a day of the delivery of Judgment 2959 it entered into discussions with the complainant as to how point 2 of the decision in that judgment could be implemented and the letter of agreement fairly represented their verbal agreement to satisfy the complainant’s rights. The Tribunal also notes the uncontroverted statements by the OPCW that the complainant was permitted to continue to have full access to its premises. He retained his access badge. He also enjoyed all other entitlements of a staff member. In these circumstances, the complainant cannot fairly contend that he did not accept the compensation in full settlement of his claim.

9. It does not seem that the complainant was hastily and unceremoniously removed from his post after Judgment 2959 was delivered, as he contends. It is apparent that the OPCW explored other alternatives that would have kept his dignity intact. The complainant

could have refused to sign the agreement. The Tribunal is satisfied that in entering into the agreement, the OPCW did not breach its duty to act in good faith and to respect the complainant's dignity. Accordingly, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 20 February 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 April 2014.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS
DRAŽEN PETROVIĆ