

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

B.
v.
OPCW

121st Session

Judgment No. 3601

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. B. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 27 May 2013 and corrected on 15 July, the OPCW's reply of 12 November 2013, the complainant's rejoinder of 17 February 2014, the OPCW's surrejoinder of 10 June, the complainant's further submissions of 21 August and the OPCW's final comments thereon of 24 November 2014;

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 decisions not to promote him to a post of Inspection Team Leader and not to designate him as an Acting Team Leader.

A vacancy notice concerning Inspection Team Leader posts, at grade P-5, in the Inspectorate Division, was issued on 17 October 2011. The complainant, an inspector at grade P-4, applied. The list of inspectors who had been promoted to the aforementioned posts was published in an e-mail of 20 December 2011; the complainant's name

was not included. The list of new Acting Team Leaders appointed by the Director-General for 2012 was published in an e-mail of 30 January 2012; the complainant was not among the 16 staff members thus appointed either. On 1 February 2012, during a meeting with the Acting Director of the Inspectorate Division, he was informed of the reasons why he had not been selected, namely the apparently negative feedback on his work from some Inspection Team Leaders.

On 8 February 2012 the complainant asked the Director-General to review the process for promotion to the P-5 Inspection Team Leader posts. On 5 March the Director of Administration replied that the process in question had complied with the provisions of the relevant administrative directive and with the Staff Regulations and Interim Staff Rules. He then asked the complainant whether he wished to request a review of a specific administrative decision and, if so, to identify it. On 25 March the complainant identified the decisions to be reviewed as being those contained in the e-mails of 20 December 2011 and 30 January 2012. On 30 March the Director of Administration informed him that his request for review had been forwarded to the Director-General, who had agreed to receive additional material with respect to that matter subsequently, i.e. after the complainant's return from mission.

On 4 April 2012 the complainant submitted an appeal to the Appeals Council challenging the decisions contained in the two disputed e-mails. On 13 April he sent a letter the Director-General enclosing supplementary material in support of his request for review of 25 March. The proceedings before the Appeals Council were therefore suspended. The complainant was informed by a letter of 16 May that the Director-General maintained his decision of 5 March as well as the decision not to designate him as an Acting Team Leader. The proceedings before the Appeals Council then resumed at the complainant's request.

By a letter of 9 October 2012 the complainant tendered his resignation on the grounds that the filing of his appeal had led to a sudden "alteration" of his performance evaluations, which was having serious implications in terms of his future with the Organisation and

his health. His resignation was accepted and the date of his separation from service was set as 31 December 2012.

On 1 February 2013 the Appeals Council issued its report at the end of written proceedings. It found that the decisions of the Director-General not to promote the complainant to the post of Inspection Team Leader at grade P-5 and not to designate him as an Acting Team Leader were not tainted with any flaws, and it recommended the dismissal of the appeal. The complainant was informed by a letter dated 27 February 2013, which constitutes the impugned decision, that the Director-General had accepted that recommendation.

In his complaint filed on 27 May 2013 the complainant requests the setting aside of the impugned decision, as well as the decisions resulting from the selection procedure held in order to fill the posts of Inspection Team Leader and to designate Acting Team Leaders, the resumption of that procedure, redress for the injury which he considers he has suffered and the payment of 10,000 euros in costs.

The OPCW submits that the complaint is irreceivable in part and asks the Tribunal to dismiss it in its entirety.

CONSIDERATIONS

1. The complainant impugns the Director-General's decision of 27 February 2013 to dismiss his internal appeal against the decisions of 20 December 2011 and 30 January 2012, which had been taken at the end of a selection process where he had been a candidate and which announced promotions to Inspection Team Leader posts at grade P-5 and the designation of Acting Team Leaders respectively.

2. One of the numerous pleas put forward by the complainant, namely his plea based on the fact that staff members who did not hold the requisite grade for participation in the disputed selection process were allowed to do so, must be accepted at the outset.

Indeed, the OPCW acknowledges that an inspector at grade P-3 was among the inspectors promoted to grade P-5 to perform the

functions of Team Leader and that grade P-3 staff members were thereafter designated as Acting Team Leaders.

Contrary to the Organisation's submissions, access to this selection process should have been reserved exclusively for grade P-4 inspectors.

3. According to Administrative Directive AD/PER/43 of 7 May 2007, governing promotion procedures for inspector posts at all levels and the designation of Acting Team Leaders, Inspection Team Leaders at grade P-5 and Acting Team Leaders may be selected only from P-4 grade inspectors.

This is the inference which must be drawn from the actual wording of paragraph 1 of that directive and from the headings of sections A and B concerning the appointment of Inspection Team Leaders and Acting Team Leaders respectively, where these appointments are envisaged solely in the form of "promotion of P-4 grade Inspectors to vacant P-5 Team Leader posts" and the "designation of P-4 grade Inspectors as Acting Team Leaders during inspections". Moreover the general terms and content of the provisions of sections A and B clearly point in the same direction.

4. As far as Acting Team Leaders are concerned, paragraph 13 of the directive provides for the designation of "[a] number of P-4 grade Inspectors" as Acting Team Leaders, while paragraph 15 lays down even more clearly that "[a]ll inspectors recommended for assignment as [Acting Team Leaders] shall be taken from the most recent list of most qualified P-4 grade inspectors" drawn up by the selection recommendation panel which, in accordance with the provisions of section A, is responsible for making recommendations regarding promotion to grade P-5.

5. As far as promotion to grade P-5 posts is concerned, paragraph 4 of the directive states that "[v]acancies to P-5 Team Leader posts will be open for internal applications by P-4 grade Inspectors in the first instance", before specifying in paragraph 12 that "[i]f no suitable candidate was identified by this process, the vacancy will be

opened for external recruitment”. The intention behind this text is plainly to rule out the possibility of promoting any internal candidates other than P-4 grade inspectors to these posts, and this must be the natural interpretation of it, especially as it would be paradoxical if staff members at a lower grade could be appointed P-5 Team Leaders when, as already stated, they are denied access to the lower-level duties of Acting Team Leader.

6. The Organisation seeks to establish that it was nevertheless entitled to grant such promotion to staff members at grade P-3.

However, none of its arguments in support of this submission convinces the Tribunal.

7. First, the Organisation contends that the vacancy notice of 17 October 2011 which was issued as part of the disputed selection process did not exclude the possibility of appointing a staff member holding a grade below P-4. It emphasises that, although the notice stated that this procedure “specifically” concerned inspectors at that grade, it also indicated that it was “open to all current employees of the OPCW” and it provided only that candidates “should have at least one year working experience” at grade P-4, without making this a mandatory requirement. However, even assuming that the intention behind this vacancy notice was indeed to offer the possibility of such an appointment to staff members other than P-4 grade inspectors, this would have been contrary to the stipulations of the above-mentioned directive of 7 May 2007, which must take precedence here. In accordance with the principle *tu patere legem quam ipse fecisti*, when an international organisation decides to fill a post by competition it must comply with the material rules which it has itself established for such appointments (see, for example, Judgments 2163, under 3, or 3032, under 22).

8. Secondly, it is to no avail that the OPCW relies on the provisions of Staff Regulation 4.2, which states that “[t]he paramount consideration in the [...] promotion of staff shall be the necessity of securing the highest standards of efficiency, professional competence and integrity”. While the Organisation must base itself on these

provisions when drafting texts governing the promotion of staff members, once these texts have been published, the Organisation is bound to comply with them and it may not effectively prevent their application by reliance on these provisions.

9. Thirdly, the Organisation's argument based on the terms of directive AD/PER/29/Rev.3 of 7 December 2010 on recruitment and selection procedures is plainly devoid of merit. Not only does the Tribunal fail to see anything in the stipulations of this directive that would support the Organisation's submission, paragraph 3 thereof actually states that it does not apply to the promotion of inspectors.

10. Lastly, although the OPCW points out that, in the past, it has already promoted P-3 inspectors to P-5 Team Leaders, the Tribunal has consistently held that a practice cannot become legally binding if it contravenes a written rule that is already in force (see, for example, Judgments 2959, under 7, or 3544, under 14). The fact that the practice relied on in the instant case conflicts with the stipulations of directive AD/PER/43 is therefore sufficient reason to reject this submission.

11. The consideration given in the disputed selection procedure to the candidature of a P-3 staff member who was among the inspectors promoted to grade P-5 pursuant to the decision of 20 December 2011, particularly insofar as it might have led to the exclusion of a candidate who was eligible for such promotion, has resulted in a major procedural flaw rendering the ensuing appointments unlawful.

12. As stated above, P-3 staff members were not eligible to be designated as Acting Team Leaders either.

The Organisation, which does not deny that it appointed staff members at that grade to such posts in 2012, points out that these appointments were made not by the aforementioned decision of 30 January 2012, but by later decisions which the complainant has not challenged. This is factually correct and, indeed, since the complainant did not lodge an internal appeal against these later decisions in due

form and within the prescribed time limits, he may not now ask the Tribunal to set them aside.

However, it is in any case plain from the evidence in the file that, in accordance with paragraph 15 of the directive of 7 May 2007, the selection recommendation panel's shortlist of candidates for promotion to grade P-5 also served as the basis for the subsequent designation, in the decision of 30 January 2012, of the Acting Team Leaders, or at least some of them. The fact that this list improperly included a grade P-3 inspector therefore had the consequence of rendering the appointments made by virtue of that decision unlawful, even though that person had in the meantime been promoted to grade P-5, as this situation did not remedy the flaw consisting in the possible exclusion of another staff member who should have been on the list.

13. In addition, the Tribunal notes that the selection procedure followed by the Organisation was flawed by other serious irregularities, which are rightly denounced by the complainant.

14. First, paragraph 9 of the directive of 7 May 2007 states that “[t]he selection recommendation panel members will produce a shortlist of candidates that are recommended for appointment to a post up to a predetermined maximum number, including a summary of justification for the selection and ranking of each of the candidates”.

These provisions were breached on three accounts.

15. No matter what the OPCW tries to argue in this respect, it is clear that the maximum number of candidates to be shortlisted by the selection recommendation panel had not been predetermined. The Organisation's own submissions show that the panel decided to make the number in question, which had not been established in advance, the same as the number of candidates whom it found to be suitable for the duties of team leader. It follows that, by definition, this number could not have been decided until all the applications had been examined. This procedure is the precise opposite of “predetermination”.

16. Moreover, the selection recommendation panel's report, which is annexed to the Organisation's surrejoinder, did not include the summary of the justification for the shortlisting of the candidates required by the above-mentioned paragraph 9. Indeed, the only information on this matter in the document in question – which, since it refers exclusively to the candidates who were ultimately promoted, appears to have been added at a later stage in the procedure – is an indication of the speciality and geographical origin of the inspectors concerned, which can hardly be equated with a summary of the justification for their selection by the panel.

17. Lastly, as the Organisation itself recognises, it is clear from this same report that the shortlist produced by the selection recommendation panel contains no ranking of the candidates. This is a further breach – and not the least important one – of the provisions of paragraph 9.

18. Contrary to the Organisation's submissions, the failure to comply with the various requirements of the applicable text, adherence to which constitutes a safeguard for candidates, was obviously liable to have a real impact on the outcome of the disputed selection procedure. Furthermore, regarding the absence of a summary of the justification for the shortlisting and of a ranking of candidates, it must be noted that these shortcomings resulted in the Director-General having insufficient information when he had to make his choices. In all respects, these major procedural flaws invalidated not only the selection of the P-5 Team Leaders but also the designation of the Acting Team Leaders, which is normally based on the remaining names on that list.

19. Secondly, the designation of these Acting Team Leaders was also flawed on account of a breach of the provisions of paragraph 15 of the directive of 7 May 2007 quoted above, according to which staff members recommended for assignment to such duties must be "taken from the most recent list of most qualified P-4 inspectors" produced by the selection recommendation panel, in other words, in the instant case, the list which has just been mentioned. It is evident from the documents in the file that only a small minority of the inspectors

designated as Acting Team Leaders by the decision of 30 January 2012 were on that list.

20. In this connection it must first be noted that, contrary to the Organisation's submissions, the burden of proof lies not with the complainant but with OPCW. It is well settled by the Tribunal's case law that it is incumbent upon an international organisation to prove that a procedure which it has put in place has been duly followed, if the implementation thereof is disputed (see, for example, Judgments 2096, under 9, or 2792, under 7). Moreover, this approach is particularly appropriate in the instant case where the facts needed to prove this matter lie peculiarly in the knowledge of the Organisation.

21. That the provisions of paragraph 15 of the directive have been breached is, however, evident from a memorandum dated 13 January 2012, which is included in the materials filed with the Tribunal, where the Acting Director of the Inspectorate Division had recommended to the Director-General the designation of the Acting Team Leaders who were subsequently appointed by the decision of 30 January 2012. This memorandum indicates that while three of the staff members concerned were on the above-mentioned shortlist, most of them had been selected by the author of the memorandum from amongst the other serving inspectors.

The Organisation seeks to justify this anomaly by contending that the list drawn up by the selection recommendation panel, which had been depleted by the P-5 appointments which had taken place in the meantime, was exhausted. Since the aforementioned directive made no provision for this situation, it submits that it had no choice but to follow the course of action it adopted.

The Tribunal considers, however, that in these circumstances the OPCW ought to have carried out a new selection process specifically in order to fill the Acting Team Leader positions, which is what paragraph 16 of the directive requires in the analogous situation where no shortlist has been drawn up for over a year. Before designating the Acting Team Leaders, the Organisation could not lawfully forgo seeking

recommendations from the selection recommendation panel, whose involvement constitutes a guarantee of transparency, objectivity and equal treatment for inspectors aspiring to these positions.

22. It follows from the above that the Director-General's decisions of 20 December 2011 and 30 January 2012 announcing promotions to Inspection Team Leader posts at grade P-5 and the designation of Acting Team Leaders respectively stemmed from a selection procedure that was unlawful in several respects. The decision of 27 February 2013 dismissing the complainant's appeal against them and the decisions themselves must therefore be set aside, without there being any need to examine the complainant's other pleas in respect thereof.

23. The Organisation must shield the persons appointed by virtue of the aforementioned decisions of 20 December 2011 and 30 January 2012 from any injury that might result from the cancellation of their appointment, which they accepted in good faith (see, for example, Judgments 2712, under 10, or 3421, under 5).

24. In the specific circumstances of this case, there are no grounds for ordering the OPCW to resume the selection procedure which led to these decisions. Indeed, since the complainant, whose resignation effective on 31 December 2012 was accepted, has now left the Organisation, he would in any event be unable to take up a possible appointment at the end of this procedure (see, for a similar case, Judgments 2769, under 7, and 3590, under 10).

25. On the other hand, the complainant is entitled to compensation for the injury resulting from the unlawful nature of the decisions which have been set aside.

26. In this connection, there is no evidence in the file that, as the complainant submits, the flaws in the disputed selection procedure deprived him of a valuable opportunity to accede to grade P-5, or to be designated as an Acting Team Leader. In fact, the complainant's final performance appraisal – which according to the vacancy notice was

one of the essential items forming the basis of evaluation in the selection procedure – and various mission assessments concerning him show that, while his performance was deemed to be satisfactory, he received only very average ratings. Having regard in particular to the large number of candidates, and leaving aside some team leaders' oral evaluations which, the complainant submits, the Organisation was wrong to obtain, it is therefore very unlikely that he would have actually been selected at the end of the procedure in question. In these circumstances, there are no grounds for awarding the complainant compensation for material injury caused by loss of a valuable opportunity.

27. On the other hand, the unlawful nature of the impugned decisions has clearly caused the complainant moral injury which, in view of its gravity, must be compensated by an award of compensation in the amount of 10,000 euros.

28. Since the complainant succeeds for the most part, he is entitled to costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The decision of the Director-General of the OPCW of 27 February 2013 and the decisions of 20 December 2011 and 30 January 2012 announcing promotions to Inspection Team Leader posts at grade P-5 and the designation of Acting Team Leaders respectively are set aside.
2. The OPCW shall pay the complainant compensation in the amount of 10,000 euros for moral injury.
3. It shall also pay him 5,000 euros in costs.
4. All other claims are dismissed.

5. The persons appointed by virtue of the decisions of 20 December 2011 and 30 January 2012 shall be shielded from any injury which might result from the setting aside of these decisions.

In witness of this judgment, adopted on 11 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ