

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**D.**  
**v.**  
**OPCW**

**127th Session**

**Judgment No. 4067**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr I. D. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 12 December 2016 and corrected on 14 December 2016, the OPCW's reply of 17 March 2017, the complainant's rejoinder of 30 May and the OPCW's surrejoinder of 31 August 2017;

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

Having examined the written submissions;

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

The complainant contests the decision not to extend his contract.

The complainant joined the OPCW on 10 January 2007 under a three-year fixed-term contract as an Inspector (Chemical Weapons/Munitions Specialist) in the Inspectorate Division. On 13 February 2007, pursuant to Section A of Part II of the Annex on Implementation and Verification ("Verification Annex") to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, the Russian Federation, a State Party to the Convention, informed the OPCW of its non-acceptance of the complainant as an Inspector. The complainant was consequently unable to undertake or participate in verification activities on Russian

Federation territory or in any other place under the jurisdiction or control of the Russian Federation.

The complainant's contract was extended in January 2010 for a period of two years. He then received two successive one-year contract extensions in January 2012 and January 2013 respectively. By a letter of 1 September 2013 he was informed that his contract would not be further extended when it expired on 9 January 2014, as he would by then have served seven years at the OPCW. It was explained that the Director-General had decided not to grant an exceptional extension of contract beyond the seven-year limit for total length of service established in Staff Regulation 4.4(b), as he was unable to undertake verification and inspection of destruction-related activities in the Russian Federation.

On 9 October 2013, however, the complainant was informed that the Director-General had reconsidered his case and had decided to offer him an exceptional six-month extension, from 10 January to 9 July 2014, on the basis that his skills and experience were necessary for the operational requirements of the verification and inspection of destruction-related activities in the Syrian Arab Republic. The complainant, who had been deployed to the Syrian Arab Republic two days earlier, accepted this offer.

By a memorandum of 10 February 2014 the Director of the Inspectorate Division recommended that the Director-General exceptionally extend the complainant's contract until 9 January 2015. The Director-General did not accept that recommendation and the complainant was so informed by a letter of 12 March 2014 which set out the reasons for that decision.

The complainant requested a review of the decision of 12 March, but he was notified by a letter dated 1 July 2014 that the Director-General had decided to maintain it. On 29 July he lodged an appeal with the Appeals Council in which he challenged the decision of 1 July 2014 and sought the extension of his contract for a further 12 months or, alternatively, compensation in lieu of renewal.

In a report of 12 January 2016 the Appeals Council recommended that the Director-General consider awarding compensation to the complainant on the basis that he had agreed to deploy to the Syrian Arab

Republic on the condition that his contract would be extended beyond 9 January 2014 consistent with the contract extensions of the other inspectors in his group (i.e. 12 months), but he had been “unable to exercise his condition” because he had been offered the six-month extension only after he had been deployed. On receiving this recommendation, the Administration asked the Appeals Council to clarify the basis upon which it had concluded that the complainant had set a condition on his deployment and that this condition had been accepted by the OPCW before he was deployed. Following an exchange of further submissions from the parties, the Appeals Council submitted a second report, dated 23 June 2016, in which it recommended, among other things, that the appeal be dismissed. By a letter of 14 September 2016, the complainant was informed that the Director-General found that his claims with respect to the decision of 9 October 2013, by which he had been granted an exceptional six-month extension of contract, were irreceivable as time-barred and that his appeal was also without merit. Thus, the Director-General had decided to maintain the decision to reject his request for review. That is the impugned decision.

The complainant asks the Tribunal to award him compensation in an amount equivalent to 12 months’ salary and any relevant entitlements and benefits. In the alternative, he claims an amount equivalent to six months’ salary. He also seeks moral damages, interest on the amounts awarded to him, and costs.

The OPCW requests the Tribunal to dismiss the complaint.

#### CONSIDERATIONS

1. The complainant commenced working with the OPCW in 2007 under a three-year fixed-term contract expiring in January 2010. Thereafter he was employed on a succession of contract extensions commencing with a two-year extension and then two one-year contract extensions and finally a six-month extension. He separated from service on 9 July 2014.

2. The complainant was offered the last of these extensions, the six-month extension, on 9 October 2013. That extension ran from 10 January to 9 July 2014. During the currency of that extension, by a letter dated 12 March 2014, the complainant, who received the letter on 4 April 2014, was informed that the Director-General had decided his contract would not be further extended when it expired on 9 July 2014. The complainant sought a review of that decision but was informed by a letter dated 1 July 2014 that the Director-General maintained his earlier decision of 12 March 2014. Thereupon the complainant appealed the decision of 1 July 2014 to the Appeals Council which, in its final report of 23 June 2016, recommended that the Director-General dismiss the appeal. In an earlier report dated 12 January 2016 the Appeals Council had recommended that the Director-General consider compensating the complainant.

3. One preliminary issue needs to be resolved before the Tribunal commences to consider the other issues. Following a short introduction, the complainant addresses in his brief the receivability of the complaint. He argues that the decision of 9 October 2013 to extend his contract by six months was an interim decision and not open to challenge. Nonetheless he makes it clear that he “challenge[s] the final and receivable decision which [he] received on the 4 April 2014, not the earlier interim administrative decision of 9 October 2013”. Notwithstanding this disclaimer about challenging the decision of 9 October 2013, the complainant addresses towards the end of the brief, under a heading “Compensation recommended by the Appeals Council”, the issue of whether the decision to only offer a six-month extension in October 2013 was a manifestation of “[an] ongoing exercise of bad faith”. The OPCW makes the point, correctly, in its reply, that the decision of 9 October 2013 was amenable to challenge and that it is not open to the complainant, relying on Judgment 3581, to do so now. Accordingly, the Tribunal will only address alleged errors attending the decision of 12 March received on 4 April 2014.

4. It is convenient, at the outset, to set out the legal framework within which the decision was made not to extend the complainant's contract when it expired on 9 July 2014. By then the complainant would have served seven years and six months with the OPCW. At the relevant time Staff Regulation 4.4 provided, firstly, that the OPCW was a "non-career organisation" and, secondly, that "[t]he total length of service of Secretariat staff shall be seven years". This latter element was the subject of two qualifications in the Regulation that are not presently relevant. In the present case, the complainant's total length of service was more than the specified period of seven years. The Director-General relied, in extending the service of the complainant beyond seven years, on a power conferred by a decision of the Conference of the States Parties at its sixteenth session (decision C-16/DEC.9) modifying an earlier decision concerning the tenure policy of the OPCW. Decision C-16/DEC.9 enabled the Director-General to exercise an exceptional authority to grant contract extensions or renewals beyond the seven-year total length of service under specific conditions. Decision C-16/DEC.9 includes a provision that "[t]his exceptional authority shall apply to the operational requirements of verification and inspection of destruction-related activities". The OPCW's tenure policy is not unlawful (see Judgments 2407 and 2660). In the former judgment the Tribunal observed in consideration 25:

"The complainants all reached the end of their fixed-term appointments and were given special extensions to work out the minimum notice period of non-renewal which the Organisation had imposed upon itself. When those short-term extensions expired they had no right and no expectation of any further employment. Their contracts had been made, and accepted by them as being, subject to the seven-year tenure rule. [...]"

5. Quite apart from the case law concerning these specific provisions and the administrative arrangements within the OPCW, the Tribunal sets its face against assessing the exercise of a discretionary power such as the power not to renew a fixed-term contract, unless it is demonstrated that the competent body acted on some wrong principle, breached procedural rules, overlooked a material fact or reached a clearly wrong conclusion (see, for example, Judgment 3991, consideration 7, and the case law cited therein).

6. The complainant advances five arguments in challenging the impugned decision. He does so on the basis that the reason or at least the core reason the Director-General did not exercise his authority to extend the complainant's contract was that the complainant, as a citizen of the Russian Federation, was not approved for the purposes of verification and destruction-related activities for chemical weapons in the Russian Federation, being the state in which most verification and destruction-related activities would take place in the future. The complainant's first argument is that the core reason not to extend his contract was incorrect. The second argument is that the Director-General failed in his obligation to prioritise the best qualified staff. The third argument is that the decision concerning the complainant involved discrimination and unequal treatment. The fourth argument is that the decision was taken for an improper purpose. The fifth and last argument is that there was no proper reason for the non-extension of the complainant's contract.

7. This last mentioned argument is demonstrably unsustainable. As discussed earlier, the approach of the OPCW to contract extensions is to limit, except in special circumstances, the extension of contracts so that any given staff member will serve for no more than seven years. That is a compelling reason and it cannot be said there was no proper reason for the non-extension of the complainant's contract. This argument is unfounded and is rejected.

8. The complainant's first argument is that the core reason not to extend his contract was incorrect. Even accepting that the core reason is as articulated by the complainant, he really does not, in his brief, come to grips with this reasoning but simply points out that, apart from the Russian Federation, there were other countries in which his skills and knowledge could have been used and that he was not prevented from entering those countries. However, the OPCW provides data concerning its activities in 2014 and 2015 that demonstrate that the preponderance of its inspection work in those years was, in fact, in the Russian Federation. As a matter of prediction in 2014, it was a prediction that was soundly based. This argument is unfounded and is rejected.

9. The second argument is that the Director-General failed in his obligation to prioritise the best qualified staff. The complainant bases this argument on the provisions of Staff Regulation 4.2 which identifies the paramount consideration in the appointment, transfer and promotion of staff as being to secure the highest standards of efficiency, professional competence and integrity. This obligation arises in relation to appointment, transfer and promotion. The present case concerns a decision not to extend an appointment beyond seven years. That circumstance is specifically addressed by Staff Regulation 4.4. No criticism can be levelled at the Director-General for focusing on that latter provision. This argument is unfounded and is rejected.

10. The third argument is that the decision concerning the complainant involved discrimination and unequal treatment. This principle is engaged and can be taken into consideration by the Tribunal and, if need be, give rise to redress on condition that it is based on precise and proven facts which establish the discrimination has occurred (as to its operation in the context of the OPCW, see Judgment 2660, consideration 24, and also, more generally, Judgment 4027, consideration 12). At its simplest, the complainant has not established different treatment in relation to another inspector who was precluded from undertaking or participating in verification activities on the territory or in any other place under the jurisdiction or control of the Russian Federation. This argument is unfounded and is rejected.

11. The fourth argument is that the decision was taken for an improper purpose. The essence of this argument is that the decision not to extend the complainant's appointment was based on political pressure from the Russian Federation. There is not a scintilla of evidence to support this assertion. As is well established, bad faith or misuse of authority must be proved and is never presumed, and the party alleging bad faith or misuse of authority must prove it (see, for example, Judgments 2800, consideration 21, and 3939, consideration 10). This argument is unfounded and is rejected.

12. The Tribunal has already mentioned an argument advanced by the complainant effectively reiterating the reasons of the Appeals Council for the award of compensation arising from the circumstances in which the last extension of six months took place. As noted earlier, this decision to extend the contract for six months was not challenged at the time and this argument is not available in this challenge to the later decision not to extend the appointment at all. Accordingly this claim is irreceivable and is rejected.

13. The complainant sought oral proceedings. As the written submissions are sufficient for the Tribunal to reach a reasoned decision, the request for oral proceedings is rejected. The complainant also sought an order requiring the OPCW to extract certain information from a database concerning the number of inspections. The complainant has not demonstrated this information is necessary to ensure a fair resolution of his complaint and his request is rejected.

14. The complainant has not established a basis on which the impugned decision should be set aside or other relief granted. Accordingly the complaint should be dismissed.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2018, 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 6 February 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ