

The Administrative Tribunal,

Considering the complaint filed by Mrs R. I. D. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 23 December 2000 and corrected on 30 August 2001, the OPCW's reply of 9 October, the complainant's rejoinder of 23 November, and the Organisation's surrejoinder of 28 December 2001;

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 Bulgarian national born in 1952, entered into the service of the OPCW on 17 November 1999 as a Policy Officer at grade P-3 in the Policy and Review Branch on a three-year fixed-term contract. Her appointment was subject to a six-month probationary period.

She had two probation period performance reports: in the first one, for the period from 17 November 1999 to 16 January 2000, her work was rated as satisfactory; in the second one, for the period from 17 January to 16 April, it was rated as unsatisfactory. In the latter it was noted that she had taken a "number" of sick leave days and it was recommended that she take steps to improve her health and, by consequence, her attendance. Following a recommendation by her supervisor the complainant's probationary period was extended for a further three months to give her the opportunity to improve her performance. However, in the following probation report her performance was again rated as unsatisfactory. In a memorandum of 31 July 2000 the Head of Human Resources informed the complainant, on the Director-General's behalf, that her appointment would not be confirmed at the end of the extended probationary period. She was separated from service as from 16 August 2000.

On 7 August the complainant requested an administrative review, by the Director-General, of the decision not to confirm her appointment and on 9 August she filed a request with the Appeals Council for a suspension of action of that decision. When the Appeals Council determined that her request was not receivable she filed an appeal on 6 October against the non-confirmation of her appointment.

On 23 December 2000 the complainant filed a complaint with the Tribunal, attacking the implied rejection by the Director-General of her request of 7 August.

On 15 January 2001 the Appeals Council submitted its report to the Director-General. It recommended that the decision not to confirm the complainant's appointment be maintained. In a letter sent to the complainant on 25 January the Director-General informed her that he was maintaining his decision. On 30 August the complainant sent a letter addressed to the Director-General and the Head of Human Resources, inquiring about the status of her appeal. On 13 September 2001 the Head of Human Resources resent the final decision to the complainant.

B. In her complaint the complainant states first that the "compulsory time limits" in Article VII of the Tribunal's Statute prevented her from waiting for the Director-General's final decision before filing this complaint; she asks the Tribunal to accept it under paragraph 3 of that article and under paragraph 5 of Article II.

The complainant acknowledges that the confirmation or non-confirmation of an appointment lies with the Director-General's discretionary authority. But in her case the Director-General relied exclusively on the opinion of her first-level supervisor which she says was unreliable. Furthermore, her performance appraisal was of questionable value because it contained factual errors. She contends that the decision was based on false statements, inaccurate and incomplete consideration of the facts, and that there were arbitrary conclusions drawn about her performance.

She argues that retroactive and conflicting assessments were made regarding her performance; it was appraised three times during her probation period but it was not until the third report that her supervisor criticised her work. Yet in its reply to her internal appeal the Organisation argued that there was "abundant evidence" that she had not performed satisfactorily during the nine months of her probation. She contends that this is mistaken, ill-intended and an abuse of discretion on the part of the Administration.

The complainant considers that the OPCW violated her substantive rights during her probationary period, that it did not give her precise warnings as required under paragraph 15(d) of the Administrative Directive on probation for fixed-term staff members and that it failed to ensure equal treatment and fair conditions of work. She also states that the Administration failed to respect her dignity and reputation and argues that the procedure for performance appraisal during her probation was tainted with irregularities and that her right to due process has not been respected.

She requests the Tribunal to quash the Director-General's decision of 31 July 2000 and to order her reinstatement in her post. She also claims damages for material and moral injury and costs.

C. The Organisation replies that the complaint is not receivable for failure to exhaust all internal means of redress. The complainant did not wait for the Appeals Council to provide its recommendation to the Director-General, nor did she wait for the latter's final decision, before she filed her complaint with the Tribunal.

On the merits, the OPCW points out that the Director-General's decision was taken within the proper exercise of his discretionary authority. According to the Tribunal's case law such decisions are subject to only limited review. It refutes that there were any factual errors or other defects in the appraisals of the complainant's performance and submits that ample evidence has been provided to support its refutation.

It notes that the Appeals Council considered that, by extending the complainant's probationary period, the Director-General had acted in good faith with a view to properly assessing her performance as well as giving her a reasonable opportunity to improve. The Council failed to find any hidden prejudice or other extraneous factor that might have been to the complainant's detriment.

D. In her rejoinder the complainant presses her argument on the receivability of the complaint. She submits that the recommendation in her second probation period performance report was for her to take action to improve her health; she did so. It was for that reason that the OPCW extended her probationary period by three months. As there were no other recommendations or warnings during the extended period of probation she submits that by not confirming her appointment the Administration abused its discretion.

E. In its surrejoinder the OPCW maintains that the complainant failed to comply with the rules of the Tribunal regarding receivability when she filed her complaint. On the merits it submits that the complainant has not shown any procedural or substantive legal defect with regard to the impugned decision.

CONSIDERATIONS

1. The complainant impugns a decision dated 31 July 2000 of the Director-General of the OPCW not to confirm her contract on the expiration of her extended probationary period.
2. The applicable Interim Staff Rules provide for an internal appeal of an administrative decision such as the one impugned. The complainant duly filed such an appeal on 6 October 2000 against the non-confirmation of her appointment. The Appeals Council issued its report on 15 January 2001 and the Director-General's decision, accepting the Appeals Council's recommendation to dismiss the appeal, was issued on 25 January 2001.
3. The complaint was filed with the Tribunal on 23 December 2000, that is several weeks prior to the conclusion of the internal appeals process.
4. The complainant argues that because Rule 11.2.03(m) of the Interim Staff Rules concerning the procedure of the Appeals Council provides for one month after the date on which the consideration of the appeal has been completed, for the adoption and submission of its report to the Director-General, and Rule 11.2.03(n) provides for another month for the Director-General to take the final decision on the appeal, she could not wait until the final

decision of the Director-General and still meet the "compulsory time limits" of Article VII of the Tribunal's Statute. She submits that her complaint is therefore receivable.

5. The complainant is clearly mistaken. Article VII(2) of the Statute provides for one time limit for a complaint to be receivable before the Tribunal, that is ninety days after the complainant has been notified of the decision impugned. Thus, the rules of procedure of the Appeals Council could not have prevented the complainant from filing her complaint within the ninety-day time limit provided for under that article since the time limit only starts after the Director-General has received and accepted or rejected the recommendation of the Appeals Council.

6. Article VII(1) provides, however, additional requirements for the receivability of a complaint, namely that the decision impugned must be the final decision of the executive head of the organisation concerned and that the complainant must have exhausted "such other means of resisting it as are open to him under the applicable Staff Regulations". Clearly, the complaint is irreceivable. The complainant has not exhausted the internal means of redress as required by that article.

7. The complainant is also wrong to invoke Article VII(3) of the Statute. The Administration did not delay in responding to her request for administrative review, and the internal appeals process, once engaged, must be allowed to pursue its course. The complainant is likewise mistaken in invoking Article II, paragraphs 5 and 6 of the Statute, for those provisions are not independently attributive of jurisdiction and are subject to the requirements of Article VII.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet