

The Administrative Tribunal,

Considering the complaint filed by Ms C.M. D. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 23 September 2002 and corrected on 22 October, the Organisation's reply of 5 December 2002, the complainant's rejoinder of 14 February 2003 and the OPCW's surrejoinder of 14 March 2003;

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 was born in 1954 and has Australian nationality. From January 1997 to December 1998 she was employed by the United Nations Special Commission (UNSCOM) in Bahrain in a General Service post at grade 5, step 6. In March 1999 she was recruited by the OPCW under an 11-month temporary assistance contract for a position as a clerk in the Protocol Branch in the External Relations Division (ERD). The position was at grade GS-4, and her contract took effect on 1 April 1999.

On 6 January 2000 the complainant was offered a three-year fixed-term appointment as a secretary in the same branch at grade GS-4, step 1, beginning on 4 January 2000. Before accepting the appointment, she wrote to the Director of External Relations asking to be placed on a higher salary step in view of her previous UN experience. The Director forwarded her request to the Director of Administration, recommending that she be offered the appointment at grade GS-4, step 10, in recognition not only of her proven abilities and previous experience, but also of the fact that she had assumed additional duties. The Director of Administration referred the matter to a committee for a recommendation.

By a memorandum of 11 February 2000 the committee recommended that the level and step for the post, which had been determined on the basis of the job description and the complainant's relevant experience and qualifications, should not be changed unless the additional duties in question were to be formally added to those of the post, in which case a modified job description would have to be submitted to the Human Resources Branch for a decision on the appropriate grading of the post.

By an e-mail of 15 March 2000 to the Director of External Relations, the Head of Human Resources requested that the complainant sign her contract as a matter of urgency, "with the understanding that the outcome of the discussions on her level/steps is not affected by the signing of the current contract". She signed it on 28 April 2000 with express reservations.

On 7 December 2001 the complainant submitted a request for review of her grade and step levels to the then Director-General. Having received no reply to this request within the one-month time limit stipulated in the Staff Rules, she lodged an internal appeal on 5 February 2002. In that appeal the complainant argued that by granting her a fixed-term appointment at GS-4, step 1, the Organisation had disregarded not only a promise allegedly made to her when she was recruited but also an established practice of the United Nations common system, adopted by the OPCW, whereby staff recruited from other UN agencies are engaged initially on terms designed to maintain their remuneration at its former level. She attributed the decision in her case to "a policy of gender discrimination in the recruitment of female staff members in the General Service category".

In its response to her internal appeal, the OPCW acknowledged the existence of the above-mentioned practice but drew a distinction as regards its application. For staff employed within the United Nations system at the time of their recruitment with the OPCW, their previous salary level is taken into account in determining the step they

should be granted for their initial appointment, but for staff not employed within the United Nations system at the time of recruitment, the step is determined solely by assessing the relevance of their previous experience to the post offered. The complainant had been separated from UNSCOM for several months at the time of her recruitment and hence belonged to the latter category. The Organisation also denied and strongly objected to her allegations of gender discrimination.

In its report dated 11 June 2002, the Appeals Council recommended that the Organisation reconsider the entry level for the post occupied by the complainant, taking into account her previous UN experience and the experience she had gained during her initial temporary assistance contract. The Council based its opinion on what it considered to be "the relevant UN Personnel Directive" (PD/1/94 dated 6 July 1994), which provides that there is no break in service if a staff member separated from service is reinstated within one year of separation.

By a letter of 5 July 2002 the Acting Director-General informed the complainant of his decision on her internal appeal. He criticised the Appeals Council for having relied on a UN Directive without establishing any legal basis for its application, and pointed out that although the OPCW generally followed the United Nations common system "as guidance", it was not part of the common system and the OPCW Staff Rules contained no provision reflecting the content of the UN Directive in question. He did not accept the Appeals Council's recommendation, but noted that her entry level had in fact been reviewed following the submission to the Human Resources Branch of a revised job description encompassing her additional duties. In the light of that review, he had decided to award her two additional steps with effect from 4 January 2000. That is the impugned decision.

B. The complainant submits that the impugned decision was illegal for non-compliance with the promise made to her upon recruitment and for non-compliance with a practice followed by the Organisation.

She claims that during the interview for her initial appointment, she was informed that although nothing could be done to change the grading of the temporary assistance contract for which she had applied, in the event that she was given the contract and that she was later on offered a full-time position with the Organisation, her previous UN experience would then be taken into account so that her remuneration would be the same as that which she had received at UNSCOM.

Referring to precedents, she asserts that in accordance with the principle of good faith, officials have a right to fulfilment of promises made by the organisations employing them, provided that certain conditions are satisfied. She argues that in her case the conditions defined in the Tribunal's case law are clearly satisfied. The promise was a commitment to take her previous experience into account if she were offered a fixed-term position. It was made by a person who was competent or deemed competent to make it. She suffered injury as a result of the breach of the promise, since her income, career prospects and dignity were all adversely affected, and there was no evidence of any change in the position in law between the date the promise was made, and the date she was granted a fixed-term position, when fulfilment of the promise became due.

Regarding her plea of non-compliance with a United Nations common system practice, the complainant refers to Judgments 421 and 1053, in which it was held that the establishment of a practice on which staff come to rely may create a legal obligation for the organisation concerned. She emphasises that the practice in question was recognised by the OPCW during the internal appeal proceedings, and asserts that it does give rise to a legal obligation. Alluding to three examples she had cited during those proceedings, she maintains that several staff members obtained additional steps by virtue of that practice.

She considers that the argument raised by the Organisation during those proceedings to explain why the practice did not apply to her is contrary to the principle of good faith since the promise made to her was not kept. The two-month break between the end of her contract at UNSCOM and her appointment at OPCW was not sufficient to prevent the application of the practice in her case. The Organisation informed her of the practice during her initial interview in order to persuade her to sign a temporary assistance contract at grade GS-4, knowing that without such encouragement she would not have accepted the appointment.

The complainant seeks the following redress: annulment of the Acting Director-General's decision of 5 July 2002 insofar as it does not fully grant her request for a higher entry level; retroactive modification of her entry level to grade GS-4, step 10; payment of an amount equal to the additional salary she would have received at grade GS-4, step 10, from 4 January 2000, with interest, and costs.

C. The Organisation replies that the complaint is irreceivable on four counts. Firstly, it asserts that any claims concerning her initial temporary assistance contract were not raised within the applicable time limits and are therefore time-barred.

Secondly, it argues that a procedural flaw which arose during the internal appeal renders the complaint irreceivable. The complainant filed an appeal ostensibly directed against the Director-General's decision not to respond to her letter of 7 December 2001, but her letter contained additional allegations of gender discrimination which required investigation; consequently, the Appeals Council ought to have rejected her appeal as irreceivable, and by failing to do so it "render[ed] the case non-receivable by the Tribunal on the ground of a formal defect".

Thirdly, the Appeals Council based its decision on UN Personnel Directive PD/1/94, to which neither of the parties had referred in their submissions. It granted the complainant the right to be heard on this issue but the Organisation was not able to respond to this new material. The Organisation considers that this procedural defect likewise renders the complaint irreceivable before the Tribunal.

Fourthly, there was no administrative decision to be appealed against. The complainant's letter of 7 December 2001 was not a request for review of an administrative decision within the meaning of the Staff Rules, but a request to the Director-General to take identified action by resolving the gender discrimination issue, reviewing her entry level and appointing her at a level commensurate with her previous education and work experience. The committee which made recommendations on her initial request for additional salary steps had indicated that the number of steps would be reconsidered if a new job description were submitted. Thereafter, the process was held up by the complainant's failure to submit an amended job description to the Human Resources Branch. The internal appeal was filed prematurely since, because of that failure, no challengeable administrative decision had been taken.

Subject to the foregoing objections to receivability, the Organisation submits that the decision to award her two additional steps was discretionary. It draws attention to the limited number of grounds on which the Tribunal will interfere with such decisions. It asserts that it fully complied with the applicable OPCW Regulations, Rules and Directives when it recruited the complainant. It denies that the promise invoked by the complainant was ever made and submits that even if such a promise had been made, the conditions governing its enforceability, as defined in the case law cited by the complainant, were not satisfied in her case. The promise was necessarily conjectural, and not substantive, since it concerned a future, hypothetical, fixed-term post; and neither the interview panel nor any individual member thereof had the authority to make a promise of that nature.

Regarding compliance with the rules of the United Nations common system, the Organisation emphasises that, although it has treated certain UN rules as indicators, it never adopted the UN Directive invoked by the Appeals Council. It also denies the existence of the practice on which the complainant relies. In three examples given by the complainant, additional steps were granted not because of the alleged practice, but "on the grounds of many years of relevant experience, as discretionary decisions of the Director-General".

Lastly, it denies that the complainant has suffered any injury, since she has been granted additional steps in respect of her additional duties.

D. In her rejoinder the complainant denounces the Organisation's attempt to blur the issues raised in her complaint and clarifies that the subject of her complaint is "the question of the step within the grade she was legally entitled to receive".

Regarding the Organisation's objections to receivability, she submits that, having never challenged the receivability of her appeal during the internal appeal procedure, the Organisation cannot do so at the present stage.

E. In its surrejoinder the Organisation maintains its position on all issues. The complaint concerns not only the complainant's entitlement to steps, but also the classification and grade of her post. It adds that if the case is confined to the issue of steps, then it is irreceivable for failure to exhaust the internal remedies.

## CONSIDERATIONS

1. The complainant seeks the retroactive adjustment of her entry level for the post of Secretary in the Protocol Branch of the External Relations Division, from GS-4, step 1, to GS-4, step 10. She applied for the post as

advertised and formally accepted it by ultimately signing her letter of appointment. Staff Rule 4.1.01 explicitly provides that "[t]he letter of appointment granted to every staff member contains expressly or by reference all the terms and conditions of employment".

2. In seeking a modification of her entry level the complainant relies on a "verbal promise", allegedly made to her by a member of the interview panel at the time of her initial recruitment for a temporary assistance contract in March 1999, to the effect that if she were selected for that contract, and if at a later date she were offered a full-time position, her previous experience with the United Nations would be taken into account. She would, accordingly, receive the same level of remuneration as that which she had been receiving at the United Nations Special Commission (UNSCOM).

This promise is denied by the OPCW, which asserts that, in any event, the official who is alleged to have made it had no authority to offer terms of appointment for "hypothetical future posts" to which the interviewee might be appointed, since the function of the members of the interview panel was merely to make recommendations. The Organisation also points out that the complainant's acceptance of the temporary assistance contract was not in any way conditional on the alleged promise of steps should she be hired on a fixed-term contract in the future, as there is no "hiring link" between temporary assistance contracts and fixed-term positions.

3. It is incumbent upon the complainant to prove that a promise in the nature of a binding commitment was made to her. However, the only evidence produced by the complainant is a written request, by which she sought confirmation of the promise from a member of the interview panel who was not the person who made the promise, and the reply "You are right", received two days later, but some two years after the fact. No other written record has been produced to support that reply, and it is noteworthy that in her submissions to the Appeals Council, although she referred to the alleged promise in her "chronology of events", she did not rely on it in support of her claims, which were based instead on an allegation of gender bias. In the absence of compelling evidence of the alleged promise, the plea fails.

4. The complainant also relies on the existence of a practice consistently applied by the OPCW and modelled on the United Nations common system, whereby employees recruited from UN agencies are initially appointed at entry level, in terms of grade and within-grade steps, in such a way that their remuneration remains similar to that which they received immediately prior to joining their new agency. The complainant argues that reliance on the alleged practice by staff members has created an obligation on the part of the Organisation to honour it, and she provides three examples of staff members who allegedly benefited from the practice.

5. For its part, the Organisation denies the existence of such a practice and points out that it is neither a UN agency nor a member of the common system. It submits that it considers applicants on their merits, "taking into account the qualifications and experience required for the post as advertised", but that it has "no practice that automatically transfers staff to the OPCW on the basis of grade levels they occupy" in their previous employment.

6. However, regardless of whether the Organisation was obliged to observe the practice in question, which has not been established, the examples referred to by the complainant in her submissions confirm that it could not have benefited her and that the Organisation was not required to take into account the grade and step level she had reached during her previous employment at UNSCOM.

7. The complainant was not hired directly from a UN agency, having been released from her employment with UNSCOM prior to applying for a job at the OPCW. She was in effect unemployed at the time she was offered the temporary assistance contract. Consequently, the Organisation took into account only her relevant experience in determining her entry level. The post subsequently offered to the complainant required "at least five years secretarial/personal assistant experience in an international organisation". The complainant had only two years' experience of that kind, and no experience of protocol work. On that basis, she was initially granted the post at grade GS-4, step 1, and when additional duties were subsequently added to her job description, her relevant experience was again taken into account in granting her two more steps.

8. This is entirely consistent with the approach taken in the examples to which the complainant refers, since the three staff members in question, who were recruited directly from within the United Nations common system, were awarded additional within-grade steps on joining the OPCW in recognition of their many years of relevant experience.

9. Lastly, it must be emphasised that the impugned decision was taken in the exercise of the Director-General's discretionary authority regarding appointments, and that it violated neither the terms of the complainant's appointment nor the Staff Regulations and Rules. In the absence of evidence of abuse the Tribunal sees no justification for interfering with this exercise of discretion.

10. In view of the foregoing considerations, all other claims of the complainant fail.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

Michel Gentot

James K. Hugessen

Florida Ruth P. Romero

Catherine Comtet