NINETY-EIGHTH SESSION

Judgment No. 2403

The Administrative Tribunal,

Considering the complaint filed by Mr F. M. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 9 December 2003 and corrected on 25 February 2004, the OPCW's reply of 2 April, the complainant's rejoinder of 23 June, and the Organisation's surrejoinder of 18 August 2004;

Considering the applications to intervene filed by Mrs E. C., Mr J.A. O., and Mr A.G. S. on 19 October 2004, and the OPCW's comments thereon of 28 October 2004;

Considering Article II, paragraph 5, 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, an Italian national born in 1966, is a former employee of the OPCW. He joined the Organisation on 27 August 1998 and resigned with effect from 31 January 2003. During his employment with the OPCW he was a participant in the Provident Fund of the Organisation; such participation was compulsory under the Interim Staff Rules for staff holding fixed-term contracts.

According to Article 2 of the Charter of the Provident Fund of the OPCW, which was issued on 13 July 1998, "[t]he object and purpose of the Provident Fund is to be an instrument of social security for staff members" and the Management Board of the Fund shall administer and invest its resources. At the end of their service staff members are entitled to receive, under Provident Fund Administrative Rule 7.3, the net value contained in their accounts with the Fund. An investment scheme was designed on the advice of a Financial Adviser (a specialist finance company), selected and appointed by the Fund's Management Board, and an investment policy was implemented from October 1998. It was administered by another company (a firm of actuaries), referred to hereinafter as the Fund Administrator.

In October 2001, in response to complaints from staff members about mistakes in their Provident Fund accounts, the Director-General requested the Office of Internal Oversight to conduct a full assessment and evaluation of the situation of the Fund. In an Interim Report issued in February 2002, the Office of Internal Oversight found that there had been mismanagement and lack of monitoring on the part of the Fund Administrator. Consequently, at the Provident Fund Annual General Meeting in October 2002 it was reported that the Management Board was reviewing the investment policy of the Fund and considering options for future investment schemes. It was also decided to adopt "capital preservation" as the governing principle of the Provident Fund, particularly in respect of the employer's contributions.

At the time of the complainant's separation from service, his total contributions to the Fund amounted to 86,131.38 euros. These contributions had been invested over the years, in accordance with policy, in two currencies (United States dollars and euros). On 9 January 2003 the complainant was notified that the amounts to be transferred to his bank account as a result of his participation in the Fund would be 27,926.09 dollars and 53,893.27 euros; this notification was signed by two members of the Fund's Management Board. Considering these amounts to represent an important loss in the capital invested and considering the notification to be an administrative decision, the complainant requested the Director-General to review the decision. On 4 April 2003 the Acting Head of the Human Resources Branch informed the complainant that his request had not been granted.

The complainant appealed against this decision on 27 April. In its report dated 15 August 2003 the Appeals Council found that there was no obligation on the part of the OPCW to make good the complainant's share in the losses suffered by the Provident Fund. The Head of Human Resources informed the complainant in a letter of 12 September 2003 that the Director-General agreed with the Appeals Council's findings. She also emphasised that the notification of payments was, in the Director-General's view, only "informative in nature" and did not constitute an administrative decision within the meaning of Staff Rule 11.2.02(a). He was also informed that he would

nevertheless benefit from “surplus units” that were to be distributed to Provident Fund participants. That is the impugned decision.

B. The complainant argues that the notification of payment is indeed a decision subject to appeal. He draws an analogy between the notification he received and a pay slip, and he points out that the Tribunal has held that a pay slip constitutes a challengeable decision. Furthermore, he says that the appeals procedure foreseen in Administrative Rule 7.8 forms part of Administrative Rule 7, which relates to “payment from the Provident Fund”. It can therefore be reasonably deduced that appeals would be directed first and foremost against payments received from the Fund.

On the merits he submits that the impugned decision is illegal on two grounds. First, it does not comply with the object and purpose of the Provident Fund, which is to be an instrument of social security. As such the Fund must, at the very least, ensure capital preservation; there can be no security if there is no such assurance. This is all the more important because participation in the Fund is compulsory. Thus, the losses he suffered are contrary to the object and purpose of the Fund. He cannot agree with the finding of the Appeals Council, which was upheld by the Director-General, that there is no obligation on the part of the Organisation to make good his losses. He argues that it is unthinkable that the Director-General’s intention, when the Charter and the Administrative Rules of the Provident Fund were adopted, was to force staff members to entrust money for their retirement to a body acting in a speculative manner, with no guarantee of capital preservation.

Secondly, the decision did not comply with the obligation of the Fund’s Management Board to manage the Fund in accordance with the terms and conditions contained in the Charter and Administrative Rules of the Fund. It stems from Administrative Rule 6.4 that in the case of “gross negligence or wilful misconduct” on the part of the Board the latter will be liable to the OPCW or to any participant of the Fund “in respect of the manner in which resources […] are administered or invested”. The complainant asserts that this was a case of negligence since the Board had left the administration and control of the Fund to the Financial Adviser (an international finance company appointed by the Board). It appears that the Board failed to identify in due time the problems encountered by the Fund or to take the steps necessary to resolve them. In addition, it appears from the Interim Report of the Office of the Internal Oversight that the Board appointed the selected company as Financial Adviser without any call for competitive bids and that the advice subsequently given by that company was not impartial; it was not even certified to perform the services it was contracted to provide. In acting this way the Board deprived the participants in the Fund of the possibility of having a duly authorised professional Financial Adviser.

The complainant contends that he lost approximately 5,000 euros of his invested capital. Had things been done correctly, he would have suffered no losses and would have received some interest.

He seeks the quashing of the impugned decision insofar as it did not respond to his claim. He requests the Tribunal to order the reimbursement of the losses he suffered on his invested capital further to his participation in the Provident Fund, as well as payment of 3.93 per cent per annum interest on his invested capital. He also requests interest of 8 per cent per annum on all sums due, plus costs.

C. In its reply the OPCW states that the complainant bears the burden of proof in respect of all his assertions and allegations. It explains that the stated objectives of the Fund must be read together with the specific rules governing the Fund. A close examination of these provisions “leads to the inescapable conclusion” that the object and purpose of the Provident Fund, as an instrument of social security, was not synonymous with a guarantee of capital preservation. It points out that the term “net value” is defined in Rule 1 of the Administrative Rules of the Provident Fund as the value of a participant’s accounts “including interest and capital gains or losses earned on those accounts”, less all costs and “possible losses resulting from operations of the Provident Fund in so far as such expenses and losses are not met by the reserve account referred to in Rule 7.2”. The argument that capital preservation is dictated by the object and purpose of the Fund is thus not supported by the Rules.

It submits that the absence of capital preservation in the investment scheme of the Fund was recognised in the Interim Report, where it was noted that “losses in the investments are borne by the staff members”. It also points out that the principle of capital preservation was adopted following the recommendations in the Interim Report.

The OPCW denies that there was gross negligence or wilful misconduct on the part of the Management Board. Nor did the Interim Report establish any such flaws. It considers that the impugned decision was “a correct application of the substantive rules governing the Provident Fund”. Furthermore, the Tribunal has long held that it will not

review an organisation's policies but only individual decisions taken to give effect thereto.

D. In his rejoinder the complainant notes that the Organisation has largely abstained from replying to his arguments. He submits that the determination of the exact meaning of "social security" constitutes one of the major issues in the present case. In his view, "security" implies protection, and there can be neither security nor protection without, at least, a guarantee of capital preservation. He argues that his position is clearly supported by the Interim Report and contends that the fact that the Fund adopted the capital preservation principle in its new scheme does not preclude the fact that it was under an obligation to ensure capital preservation under the previous one.

He maintains his opinion that there has been "gross negligence and/or wilful misconduct" on the part of the Management Board, causing him prejudice for which he should be compensated.

E. In its surrejoinder the OPCW states that the complainant has misinterpreted the Organisation's position, and it reiterates that it is the complainant who bears the burden of proof.

It argues that the investment scheme adopted in 1998 was in response to staff members' interest to have a more aggressive investment policy. It contends that this interest was based on the expectation, at a time of booming stock markets, that profits would be made. The investment policy adopted in 1998 contained no guarantee of capital preservation. Furthermore, the complainant has not cited any provision in the Fund's Rules to support his assertion that capital preservation was guaranteed.

The Organisation submits that the issue at stake is whether the payment of the "net value" of the complainant's Provident Fund entitlements constituted a correct application of the Fund's Rules; the OPCW submits that it did.

CONSIDERATIONS

1. The complainant, a former staff member of the OPCW, was a participant in the OPCW Provident Fund.

2. As the amounts paid to his bank account upon his separation from the OPCW indicated a capital loss of approximately 5,000 euros on the contributions paid to his accounts with the Provident Fund, the complainant wrote to the Director-General of the OPCW on 5 March 2003, requesting a review of the decision embodied in the notification received by him on 9 January. He contended in his request for review that the decision was illegal as the Charter of the Provident Fund precluded capital loss and, additionally, claimed that the Fund had been mismanaged. He sought "reimbursement for the losses [...] suffered" and claimed interest on the invested capital at the "normal interest rate" that would have been paid had the contributions been placed in a "normal bank account". His request for review was refused on 4 April 2003.

3. On 27 April 2003 the complainant lodged an appeal with the Appeals Council which held that there was no obligation on the part of the OPCW to make good the complainant's share in the losses suffered by the Provident Fund. It did, however, recommend that, as he had units in certain funds up to October 2001, his entitlements be recalculated to take account of "surplus units" subsequently identified by the Fund Administrator to be distributed to Fund participants.

4. The complainant was advised by letter of 12 September 2003 that the Director-General had decided to accept the finding and recommendation of the Appeals Council. That decision is the subject of the complaint. No issue is raised as to the receivability of the complaint.

5. The complainant contends, as he did in his request for review and in the proceedings before the Appeals Council, that the capital loss which was apportioned to him is precluded by the Charter of the Provident Fund and that the loss resulted from mismanagement. He asks that the decision of 12 September 2003 be set aside to the extent that it does not respond to his claim and that he be granted compensation for the capital loss he suffered, together with interest at the rate of 3.93 per cent per annum on the capital invested in his accounts with the Provident Fund. He also seeks interest at the rate of 8 per cent per annum on the resulting sum, as well as costs.

6. By its reply and surrejoinder, the OPCW maintains that the Charter and Administrative Rules of the Provident Fund not only do not preclude the apportionment of capital loss, but expressly provide for that possibility. Further, it argues that the complainant has failed to establish mismanagement of the Provident Fund or

the violation of any legal right relating to the Fund. Finally, it contends that the complainant is seeking the review of a policy decision, not an individual decision giving effect to that policy or applying a substantive rule.

The Provident Fund and relevant provisions of its Charter and Rules

7. Staff Regulation 6.1 provides for "the participation of staff members in a Provident Fund" and requires the Director-General to establish rules to govern the Fund. Rule 6.1.01(a) of the Interim Staff Rules provides that "[p]articipation in the Provident Fund of staff members with fixed-term appointments is compulsory" but allows the Director-General to grant an exemption if the staff member is a participant in certain similar funds. Rule 6.1.01(e) provides for the Provident Fund to "be administered in terms of its charter and the administrative rules thereunder".

8. A Provident Fund was established at the time of the Preparatory Commission of the OPCW with a conservative investment policy which continued for some little time after the Charter and Administrative Rules of the Provident Fund were issued on 13 July 1998. Article 2 of the Charter relevantly provides that "[t]he object and purpose of the Provident Fund is to be an instrument of social security for [OPCW] staff members". It also provides, subject to the Administrative Rules, for the resources to be invested "in accordance with established investment policies and guidelines" and for the "return [of] the net value [of their] accounts to […] eligible staff members upon termination of their employment". Article 3.1 provides for "[t]he administrative and other direct costs and expenses of the Provident Fund" to be payable from contributions made to the Fund.

9. Article 6 of the Charter provides for a Management Board consisting of six members, two of whom are elected by the Professional and higher staff and two of whom are elected by the General Service staff. The other two are the Deputy Director-General, who is the Chairman of the Board, and the Director of Administration. By Article 9.1 the Management Board is to meet "at least once quarterly". Article 11.2 requires the Board to ensure that financial records are kept so that "its rights and obligations can at all times be derived from such records".

10. Rule 7 of the Administrative Rules of the Provident Fund provides for the establishment of separate A, B and C accounts for each participant, the A account for his or her compulsory contributions, the B account for the OPCW contributions and the C account for additional voluntary contributions by the staff member. Rule 7.3(a) provides that a participant whose service ceases after a period of three months is "entitled to receive [...] the net value contained in his or her [...] A, B and C accounts respectively". Rule 1 defines "net value" to mean:

"the value of the participant's A, B and C accounts, including interest and capital gains or losses earned on those accounts, less all costs and administrative expenses associated with the maintenance of those accounts as well as possible losses resulting from operations of the Provident Fund in so far as such expenses and losses are not met by the reserve account referred to in Rule 7.2 of [the] Administrative Rules."

Rule 7.2 provides for the establishment of a reserve account, consisting of the contributions made by the OPCW in respect of staff members who cease service, other than for health reasons, before completing three months of service. The Management Board may make use of that account to cover losses incurred by the Fund and to meet administrative expenses.

11. Two other provisions of the Administrative Rules should be noted. Rule 6.4 provides that only "in the case of gross negligence or wilful misconduct [...] shall the Management Board be liable to the OPCW or to any participant [in the Fund]". Rule 5(f) provides that "participants and the OPCW shall have only such rights regarding the Provident Fund as are explicitly conferred upon them by the provisions of [the] Administrative Rules, as amended from time to time".

12. Shortly after the Charter and Administrative Rules were issued, the Management Board decided, on the advice of the Provident Fund's Financial Adviser, to adopt a more aggressive investment policy. The new investment policy was approved at the 1998 Annual General Meeting and put into effect in October of that year. The Management Board explained the new policy in these terms:

"The Board will pursue an investment policy that will, in the medium to long-term (*3/4 years +*), aim to provide a net return to staff members that is superior to that available from deposit and bond based investments and which represents a real return in advance of inflation in the reference currency. To minimise short-term risk and volatility

within the Provident Fund, the Board will pursue a policy of investment diversification."

The Management Board also stated:

"The Board will establish means by which the investment performance of the Provident Fund can be monitored. The Board will regularly review investment performance and make any necessary adjustments to the investment mix of the Provident Fund."

13. Many complaints were made by staff members with respect to the Provident Fund during 1999, 2000 and 2001. On 24 September 2001, the Director of the Office of Internal Oversight alerted the Director-General to the situation concerning the Fund which was said to be both serious and urgent. On 25 October 2001, the Director-General requested the Director of the Office of Internal Oversight to conduct a full assessment and evaluation of the Fund. In February 2002 an Interim Report was presented to the Director-General. It will later be necessary to refer to some aspects of that report. For themoment, however, it is sufficient to note that until the end of September 2001, the contributions were invested, in the main, with Scottish Equitable International and Union Bank of Switzerland (UBS). From October, the monthly contributions were placed in bank deposit accounts. In March 2002, the Provident Fund disinvested all funds placed with Scottish Equitable International and the funds were thereafter put in bank deposit accounts. In June 2002, staff members were given the right to choose whether to retain the UBS units held in their accounts or to place the funds in a bank deposit account in the currency in which the units were held.

Capital preservation

14. The complainant's first argument is that, as Article 2 of the Charter of the Provident Fund specifies that the Fund is to be "an instrument of social security", it must be managed to ensure capital preservation notwithstanding that the Administrative Rules contemplate the possibility of loss. In this regard, it is put that Article2 of the Charter is the primary or higher norm and that the reference in that Article to "social security" necessarily implies a guarantee of capital preservation. The argument must be rejected.

15. Article 2 of the Charter is a statement of the object and purpose of the Provident Fund. As such, it is neither normative nor prescriptive. At best, it is a statement which may influence the interpretation of its other provisions and those of the Administrative Rules if their meaning is not clear. However, the definition of "net value" in Rule 1 of the Administrative Rules and the terms of Rule 7.2 with respect to the "reserve account" make it perfectly clear that the scheme thereby established was one in which capital losses might occur and, if so, might be apportioned among the participants.

Mismanagement of the Provident Fund

16. It is not in doubt that an international organisation is under an obligation to take proper measures to protect its staff members from physical injury occurring in the course of their employment. The same is true with respect to loss of or damage to their personal property. As a matter of principle, the same must be true of financial loss suffered in the course of their employment. Particularly is that so where, as here, the loss is directly associated with compulsory participation in a fund established by the organisation and managed in accordance with rules which limit the participants' rights with respect to that fund. In this last regard, it is sufficient to note that the Administrative Rules limit the liability of the Management Board to cases of gross negligence and wilful misconduct and limit the participants' rights with respect to the Provident Fund to those expressly conferred by the Rules.

17. The complainant and the OPCW have both made submissions on the question as to whether there was gross negligence or wilful misconduct on the part of the Management Board of the Provident Fund. As the present claim is made against the OPCW itself, the question is whether it took proper measures to protect the complainant from financial loss through his compulsory participation in the Provident Fund. On that question, it is necessary to refer to the Interim Report prepared at the request of the Director-General by the Office of Internal Oversight.

18. It is clear from the Interim Report and, indeed, from the nature of the investment policy adopted in October 1998 that the scheme thereby implemented was both riskier and more complex than that which previously existed. Given these considerations and given, also, that the scheme was new, it was necessary that there be an effective system for monitoring the performance of the Provident Fund once the new policy was adopted. Indeed, it appears

from the Interim Report that, as early as May 1998 the Fund Administrator proposed that the Management Board maintain "its own database […] to monitor the data of the [...] Fund". No action was taken on that proposal as it was considered that it amounted to mere duplication of the function that the company who was Fund Administrator was to perform pursuant to their contract with the Fund.

19. It is clear from the Interim Report that the critical problem was that, although the Management Board had ultimate responsibility for managing the Provident Fund, it did not play any significant role in monitoring the Fund's performance. In this respect, the Report quotes the view of the Chairman of the Board that "it was not the Board's role to carry out detailed monitoring of the scheme [for that] function was clearly assigned to BFB [the Budget and Finance Branch of the Secretariat]". Similarly, two other Board members are quoted as saying that "the Board appeared to have assumed that BFB was doing its duty, but without either clearly defining or routinely monitoring the performance of this duty".

20. Whether or not it was the responsibility of BFB to monitor the performance of the Provident Fund, it is properly to be inferred that no detailed analysis was undertaken until July-August 2001. At that stage, BFB reported that 23 per cent of participants had lost money – in four cases more than 12 per cent of their capital – and that two thirds of the Fund's assets were losing money. That inference is to be drawn from the Management Board's statements – to the effect that it would make adjustments to the investment mix and, it is to be assumed, would have done so if it had been aware of the true situation – and from the following facts which emerge from the Interim Report:

· complaints were made by participants throughout 1999, 2000 and 2001;

· the costs of administration and management were considerably higher than had been estimated in 1998, rising to 3.2 per cent of the value of contributions in 2000;

· although the average return on investments was 8.3 per cent and 5.85 per cent in 1999 and 2000, respectively, inflation in those years was 2.2 per cent and 2.5 per cent.

21. Had the performance of the investments been monitored and analysed for the quarterly meetings of the Management Board, it would have been obvious sometime during 1999 that, after allowing for administrative expenses and inflation, the investment policy was not achieving its objective of a return that was "superior to that available from deposit and bond based investments and [...] a real return in advance of inflation". By the first quarter of 2000, it would have been obvious that the net return was less than could be earned by putting the contributions on bank deposit.

22. Having regard to the above matters and in view of the objective of the Provident Fund and the stated aims of the investment policy, it is reasonable to conclude that, had there been a proper system of monitoring and analysis in place, the Management Board would have taken steps not later than the second quarter of 2000 to change the nature of its investments along the lines subsequently taken in 2001 and 2002. In this regard, some thought was given to adjusting the investment mix in the last quarter of 2000 but not proceeded with because of the extra fees quoted by the Fund Administrator.

23. It follows from the above that the OPCW did not take adequate measures to ensure regular monitoring of the performance of the Provident Fund and that this contributed directly to the capital losses sustained by it and, subsequently, apportioned to the complainant. He is, thus, entitled to compensation for the loss sustained by him. However, it does not follow that he is entitled to the full amount claimed.

Prejudice sustained

24. As earlier indicated, the Director-General accepted the recommendation of the Appeals Council that the complainant share in the distribution of the surplus units identified by the Fund Administrator. This resulted in a payment (including interest) of 349.75 euros. Thus, his actual capital loss was not more than 4,700 euros. Some part of that loss resulted from the complainant's choice to retain his UBS units, rather than divest himself of them and place the resulting money in a bank deposit account. However, that accounts only for loss occurring after July 2002. It emerges from the Interim Report that the major losses occurred in 2000 and 2001 and it would appear reasonable to conclude that the loss sustained by the complainant for the period July-December 2002 would not exceed 500 euros. The prejudice he suffered as a result of the investment policy of the Provident Fund may, thus,

be treated as 4,200 euros.

25. To say that the OPCW was in breach of its obligation to establish an effective system to monitor the performance of the Provident Fund is not to say that it is liable for the whole of the loss referable to the investment policy. It is liable only for the loss that occurred as a result of the breach of its obligation. It cannot be concluded that proper monitoring would have resulted in a decision to change the investment mix before the end of the second quarter of 2000. Even then, it would have taken some time to implement the decision. Taking these matters into account, it is reasonable to regard the loss (including interest) sustained by the complainant, which was due to the failure of the OPCW to establish an effective monitoring system, as 2,500 euros.

26. The argument made by the OPCW that the complainant is seeking no more than the review of a policy decision must be rejected. The complaint is based on a decision that the OPCW was under no obligation to make good, either in whole or in part, the capital losses of the Provident Fund apportioned to the complainant. That decision involved an error of law and must be set aside.

27. The OPCW has opposed the applications to intervene on the grounds that it is not established that the applicants are in the same position in fact and in law as the complainant. According to Article 13(1) of the Tribunal's Rules: "Anyone to whom the Tribunal is open under Article II of the Statute may intervene in a complaint on the grounds that the ruling which the Tribunal is to make may affect him." As the interveners are former OPCW employees it is clear that the present ruling may affect them. Their applications to intervene are therefore granted to the extent that they are in the same situation in fact and in law as the complainant.

DECISION

For the above reasons,

1. The Director-General's decision of 12 September 2003, that there was no obligation on the part of the OPCW to make good the losses in the Provident Fund apportioned to the complainant, is set aside.

2. The OPCW shall pay the complainant the sum of 2,500 euros together with interest at the rate of 8 per cent per annum from 9 January 2003 until the date of payment.

3. The applications to intervene are allowed to the extent that the applicants are in the same situation in fact and in law as the complainant.

4. The OPCW shall pay the complainant's costs of the proceedings before this Tribunal in the sum of 2,000 euros.

In witness of this judgment, adopted on 5 November 2004, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.