NINETY-NINTH SESSION

Judgment No. 2453

The Administrative Tribunal,

Considering the complaint filed by Mr H.R.N.G. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 12 August 2004, the OPCW's reply of 29 October, the complainant's rejoinder of 13 December 2004, the OPCW's surrejoinder of 18 March 2005, the complainant's further submissions likewise dated 18 March 2005 and the Organisation's final comments thereon of 15 April 2005;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings;

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

A. Facts relevant to this case are to be found in Judgment 2407, delivered on 2 February 2005.

On 2 July 1999 the Conference of the States Parties adopted revised Staff Regulations stipulating, in Regulation 4.4, that the OPCW is a non-career organisation and that, subject to certain exceptions which are not relevant to the present case, the total length of service of staff of the Organisation's Technical Secretariat shall be seven years. On 28 March 2003 the Executive Council decided that the effective starting date for the seven-year tenure rule would be the date on which the Staff Regulations had been adopted, that is to say 2 July 1999. In addition, the Conference of the States Parties decided on 30 April 2003 that as from 2003 the average rate of turnover of Secretariat staff subject to the tenure rule would be one-seventh per year.

The complainant, an Indian national born in 1953, joined the OPCW on 23 June 1997 under a fixed-term appointment. His initial contract was cancelled and superseded by another, which, after three extensions, was due to expire on 31 December 2004. The procedure set out in Administrative Directive AD/PER/28 of 9 May 2003 for the extension or renewal of fixed-term contracts applied to him. It stipulates in particular that a "properly substantiated" recommendation as to whether or not to extend a staff member's contract must be submitted to the Human Resources Branch by the director of the division or office to which the staff member is assigned. That recommendation is then referred to the Director-General, who, in the words of the directive, makes the decision "within his discretion and in the interests of the Organisation", taking into account, "*inter alia*, the criteria contained in Article VIII, paragraph 44 of the Chemical Weapons Convention, relevant provisions of the Staff Regulations and Interim Staff Rules, and the decisions of the Executive Council and the Conference of States Parties on the Tenure Policy of the Organisation". In this case, a recommendation in favour of renewal, for a period of one year, was made by the acting director of the complainant's division.

By a letter dated 10 June 2004 the Head of the Human Resources Branch notified the complainant that, pursuant to the decisions of the Executive Council and Conference of the States Parties establishing the tenure rule and the associated turnover policy, the Director-General had decided that his contract would not be extended when it expired on 31 December 2004.

On 7 July 2004 the complainant submitted a request for review of the decision not to renew his contract. He sought permission to appeal directly to the Tribunal in the event of a negative response. He contended that the non-renewal decision was not properly substantiated and that it was flawed by an error of law, and he asked to be granted "the usual contract extension of one year" or to be awarded compensation. By a letter dated 21 July 2004, the Head of the Human Resources Branch informed the complainant that the Director-General confirmed his decision not to renew his contract and authorised him to appeal directly to the Tribunal. That is the impugned decision.

B. The complainant's pleas and arguments are presented in a collective brief submitted not only on his behalf but also on behalf of several other complainants* represented by the same counsel. He contends, firstly, that the impugned decision is illegal because it does not comply with the obligation properly to substantiate a decision.

Having recalled that under the terms of Administrative Directive AD/PER/28 the Director-General has an obligation, in cases where no extension of contract is offered, to inform the staff member of the reasons in writing, he points out that the only reason given to justify the decision not to renew his contract for one year is a general reference to the decisions of the Executive Council and Conference of the States Parties concerning, respectively, the tenure rule and the turnover policy. However, that reference does not enable him to know the actual reasons for the non-renewal of his contract. The Director-General has failed to explain why he decided not to follow the favourable recommendation of the acting director of his division. According to the complainant, this failure to disclose the actual reasons for the non-renewal of his contract casts doubt on the legality of those reasons. Indeed, he suggests that it may have been based on a hidden reason.

Secondly, the complainant contends that the impugned decision is flawed by an error of law. He argues that the Director-General illegally applied a new condition on contract renewals which was not incorporated in the contract he signed with the Organisation and which constituted an essential and fundamental change to his conditions of employment. The complainant acknowledges that when he signed his most recent contract he was aware that the total length of service was seven years. However, he asserts that he was not aware that his contract might not be renewed on the grounds of an annual staff turnover requirement, after only five years of service calculated from the date on which the tenure rule took effect. Nor was he aware of the criteria that would be used to determine who would be selected for non-renewal on that ground. He considers that the Organisation was under an obligation to postpone the implementation of the turnover policy, instead of making its staff members pay for the "negligent failure", on the part of its policy-making organs and Technical Secretariat, to determine in a timely manner the way in which the tenure rule was to be implemented. He points out in this regard that it was stated in the Annual Report of the Office of Internal Oversight for 2002 that "[u]nless substantial and drastic changes are introduced in the management of the human resources, the Human Resources Branch [...] is not currently capable of ensuring a sound implementation of the tenure policy".

The complainant asks the Tribunal to set aside the decision of 21 July 2004 and to order the Organisation to reinstate him with retroactive effect as from the date of his separation from service, drawing all legal consequences from such reinstatement in terms of salary, post adjustment, allowances, benefits and contributions to the Provident Fund, and without taking into account, for the calculation of his seven-year total length of service, the time that will have elapsed between the date of separation and the date of reinstatement. Failing such reinstatement, he asks the Tribunal to order the Organisation to pay him the equivalent of one year and six months' gross salary, taking into account his step increments, and including the post adjustment and all allowances and benefits to which he would have been entitled had his contract been renewed, as well as the Organisation's contribution to the Provident Fund. In addition, he claims 25,000 euros in moral damages and a further award for costs.

C. In its reply the Organisation observes that the "Statement of Facts and Pleas" submitted by the complainant shows no cause of action, since it contains little more than an invitation to the Tribunal to refer to a collective brief which is not even appended to his submissions. The defendant asserts that there is no legal basis for this course of action and requests that the Tribunal dismiss the complaint as irreceivable for failure to observe the Tribunal's procedural rules.

On the merits, the Organisation points out that the complainant had a fixed-term contract and refers to the case law confirming that such contracts carry no expectation of renewal. Decisions as to whether or not to renew them fall within the discretionary authority of the Director-General and are therefore subject to only limited review by the Tribunal.

The Organisation asserts that the complainant was aware that the non-renewal decision stemmed from the obligation imposed on the Director-General to implement the tenure rule. The said obligation constituted a sufficient reason for the decision not to renew the fixed-term contract of a staff member whose total period of service was less than seven years, even where the staff member's performance record was satisfactory, as in the present case. Nevertheless, it submits, the Director-General also took into account, inter alia, the criteria mentioned in Article VIII, paragraph 44, of the Chemical Weapons Convention, the relevant provisions of the Staff Regulations and Interim Staff Rules, the decisions of the Executive Council and Conference of the States Parties concerning the tenure rule and relevant elements from his personal file, such as performance appraisal reports and the recommendation of his acting division director. With regard to the latter element, it points out that the Director-General is under no obligation to indicate his reasons for not following a division director's recommendation concerning the renewal or non-renewal of a fixed-term contract.

Rejecting the allegation that the non-renewal decision is flawed by an error of law, the Organisation emphasises that Staff Regulation 4.4 embodying the tenure rule existed at the time when the complainant accepted the last extension to his fixed-term contract, and that neither the tenure rule nor the turnover policy affected his legal status, which was at all times that of a staff member employed under a fixed-term appointment with no contractual right to the renewal thereof. As for the alleged delay in deciding how to implement the tenure rule, it submits that its cautious approach to this issue did not infringe any contractual right of the complainant. Moreover, the Director-General had no legal basis to refuse or postpone the implementation of the decisions of the Executive Council and Conference of the States Parties.

The Organisation asks the Tribunal to order a hearing at which its Director-General would appear as a witness.

D. In his rejoinder the complainant explains, with regard to the procedural objection raised by the defendant, that since his case was, initially at least, similar in fact and law to the cases of the other complainants with whom he submitted the collective brief, he considered it both reasonable and in the interest of a good administration of justice to rely on their complaint and thus avoid the submission of numerous briefs which would have been, *mutatis mutandis*, identical. He maintains his position on the merits. The Tribunal subsequently invited him to make further submissions in the light of Judgment 2407, which was delivered after he had filed his rejoinder. These submissions are summarised under F, below.

E. In its surrejoinder the Organisation reiterates its objection to receivability. Referring to Judgment 2407, it maintains that the impugned decision was properly substantiated and that it was not tainted by any error of law. In the light of that same judgment, it withdraws its application for hearings.

F. In his further submissions the complainant asserts, with particular reference to consideration 20 of Judgment 2407, that in his case there is evidence of ulterior motive and bad faith which justifies the setting aside of the impugned decision. He refers to the fact that he was Chairperson of the Performance Management and Appraisal System (PMAS) Rebuttal Panel which reviewed the performance appraisal of Mrs C., the complainant in the case leading to Judgment 2408. The Panel recommended that the rating given to her for 2001 by two senior members of the Administration should be disregarded on the grounds that it was "in substance and procedure, inconsistent with the goals and purposes of the PMAS system". According to the complainant, the Administration then put pressure on the Panel to change its mind, but the Panel maintained its position on the merits in the revised report it issued subsequently. He considers that the Organisation decided not to renew his contract, and likewise that of another member of the Panel, in retaliation following this incident.

G. In its comments on the complainant's further submissions, the Organisation expresses the view that the complainant has failed to respond to the Tribunal's invitation to comment on the possible application of Judgment 2407 to his case, and that his further submissions should therefore be disregarded in their entirety.

CONSIDERATIONS

1. The complainant contests a decision of the OPCW not to renew his fixed-term contract in purported pursuance of the Organisation's tenure rule and turnover policy. In most respects his situation is similar to that of the complainants whose cases were considered in Judgment 2407. Following the delivery of that judgment, the Tribunal invited the complainant to enter further submissions as to why his case should not be governed by the outcome in that earlier case.

2. In his further submissions, the complainant places particular reliance on a passage in Judgment 2407 where, under 20, the Tribunal noted that there was "no evidence of wrongdoing such as personal prejudice, ulterior motive or bad faith". He says that his case is far closer on the facts to that which the Tribunal dealt with in Judgment 2408 where it found that there was such evidence and the impugned decision was accordingly set aside.

3. In Judgment 2408 the Tribunal was at pains to point out the factual differences between the situation of the complainant in that case – Mrs C. – and that of the complainants who were dealt with in Judgment 2407:

"3. There are also significant differences between the present case and the case of the complainants considered in Judgment 2407. The first difference is that the complainants in that case had been employed for periods ranging from nearly five to nearly six years, whereas the present complainant had not served three years

when she was informed that her contract would not be renewed. The second difference is that, save in the complaint of [Mrs E.], in which the facts are not clear, the decisions considered in the said Judgment were made following recommendations based on the staff turnover policy. In the present case, there was no recommendation based on that policy; there was, however, a recommendation based on unsatisfactory performance.

4. Another difference is that the present complainant had a troubled employment history within the OPCW, whereas the other complainants point to no such history. Rather, they point to an employment history where their performance had routinely been assessed as high or satisfactory and, prior to its abolition, the Contract Extension Board appears to have recommended the extension of all the contracts for at least another year.

5. The final difference that should be noted is that the complainants whose complaints were considered in Judgment 2407 assign no credible reason, other than the staff turnover policy, for the decision not to renew their contracts. The present complainant contends that, in her case, the decision was taken because of the Director of Administration's 'personal grudge' against her. For this reason, it is argued, the decision involved an abuse of authority, want of good faith and was taken in breach of the obligation to protect her dignity and reputation and not to cause her unnecessary distress."

4. After reviewing in detail the troubled employment history of the complainant in Judgment 2408 the Tribunal stated in conclusion:

"23. When the above matters are analysed in the context of the open and long-standing hostility between the complainant and the Director of Administration, much of which is recounted in Judgment 2324 and which was clearly made known to the Director-General on 22 April 2003, it must be concluded that the decision not to renew her contract was not taken in implementation of the staff turnover policy. That is not to say that it was taken at the behest of the Director of Administration or any other person. Nor is it to say that the decision was taken to satisfy a personal grudge on the part of the Director of Administration. However, in the face of that hostility and in the absence of any relevant procedure or recommendation based on the staff turnover policy, it is to be concluded that the decision was taken to rid the OPCW of the serious personal and professional conflict that existed between two senior members of the Secretariat and to avoid the necessity of taking steps to resolve that conflict. That was an improper purpose and to take a decision for that reason under cover of implementation of the staff turnover policy is both an abuse of authority and an act which demonstrates want of good faith."

5. A brief review of the present complainant's employment history shows that it bears little similarity to the circumstances of the complainant in Judgment 2408. He started working for the OPCW on 23 June 1997. He received various extensions of his contract, the last being to 31 December 2004. His position was that of Team Leader at grade P-5. The acting director of his division recommended that his contract be renewed for one further year. On 10 June 2004 he was notified that his contract would not be renewed upon its expiry at year's end. His performance record was entirely satisfactory and on his release from the Organisation he had served more than seven years.

6. In his further submissions the complainant argues that there is evidence of ulterior motive and bad faith which should lead the Tribunal to set aside the impugned decision. He was Chairperson of the Rebuttal Panel which reviewed the performance appraisal for 2001 of Mrs C., the complainant in Judgment 2408. The Panel in a first report recommended disregarding her overall rating for 2001 but, feeling it impossible in the circumstances to obtain a new evaluation, recommended that there should simply be no overall rating for Mrs C. for that year.

7. The Panel was subsequently asked by the Acting Head of the Human Resources Branch to reconsider its report. The complainant sees in this an implied threat to the Panel members and interference in the independence of their function. In fact the only evidence of the request to reconsider is a memorandum dated 18 February 2003 from the Acting Head, the relevant part of which reads:

"We have received legal advice from the Acting Legal Adviser regarding the Panel's conclusion, advising that it has acted outside its mandate. According to the Administrative Directive on PMAS (AD/PER/18), the Panel is mandated to consider the rebuttal claim and 'prepare [...] a brief report setting forth the reasons why the original rating should, or should not, be maintained' [...]. The same Directive further provides that 'if it is of the view that the original rating should notbe maintained, the report shall state what, in the Appeals Panel's (sic) view, is the appropriate rating of the staff member's performance'. In the opinion of the Acting Legal Adviser, under the cited Directive, the Panel cannot 'nullify' the rating, or the [performance appraisal] as a whole, for that matter.

The Panel is, therefore, requested to consider the matter in accordance with the procedure set forth under the cited Directive, otherwise this would create a gap in the staff member's performance record, contrary to the purpose of the PMAS system."

8. The evidence also shows that the Panel complied with this request and, on 1 May 2003 issued a revised report in which it recommended replacing the former rating for 2001 with one which was to be based on a mid-year appraisal which they considered not to be flawed:

"Prior to the arrival of the staff member's new supervisor, the staffmember had received a mid-term review indicating that the staff member had fully met performance expectations. This rating should thus prevail for the year 2001."

9. This evidence simply does not support the complainant's allegations of undue interference or that there was an improper motive underlying the decision, taken over a year later, not to renew the complainant's contract on its expiry in due course and in accordance with the tenure rule and turnover policy.

10. There being no other grounds alleged or argued to justify a different result from that obtained in Judgment 2407, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

_____* Their complaints are the subject of Judgments 2452, 2454 and 2456, also delivered this day.

Updated by PFR. Approved by CC. Last update: 14 July 2005.