

The Administrative Tribunal,

Considering the complaint filed by Mr G. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 21 April 2004 and corrected on 4 May, the OPCW's reply of 13 August, the complainant's rejoinder of 29 September, the OPCW's surrejoinder of 30 November 2004, the complainant's further submissions of 10 March 2005 and the Organisation's final comments thereon of 15 April 2005;

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

Having examined the written submissions and disallowed the defendant's application for 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, a Romanian national born in 1949, joined the OPCW on 1 July 1998 under a three-year fixed-term contract, which was extended as from 1 July 2001 for a period of two years. On 1 April 2003 the Contract Extension Board recommended that his contract be extended again for a period of one year. However, by a letter dated 16 May 2003 the Acting 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 renewed upon its expiry on 30 June 2003. In that same letter, the complainant was informed that the Director-General was nevertheless prepared to offer him a special extension of up to six months, between that notification and his actual separation from the Organisation, should he so require. He accepted the offer of a special extension, reserving the right to challenge the decision not to extend his existing contract.

The complainant then sent three letters to the Acting Director of the Inspectorate Division, and another to the Acting Head of the Human Resources Branch, asking to be given the reasons for the decision not to renew his contract. Having received no reply to these letters, on 28 May 2003 he submitted a request for review of the decision of 16 May to the Director-General. By a letter dated 23 June 2003, the Acting Head of the Human Resources Branch informed the complainant that the Director-General confirmed the decision of 16 May not to extend his fixed-term contract upon expiry and that, since he had decided to take advantage of the offer of a special extension, his separation would become effective on 15 November 2003.

On 8 July 2003 the complainant lodged an appeal with the Appeals Council. While his appeal was pending, he applied to the Appeals Council for a "suspension of action", under Interim Staff Rule 11.2.02(c)(i), in respect of the decision of 16 May. The Appeals Council was in favour of a suspension, particularly to allow the issue raised by his appeal to be examined by the Tribunal, but the Director-General rejected its recommendation to that effect.

In its report dated 20 January 2004, the Appeals Council concluded that the OPCW had unilaterally changed the complainant's fundamental conditions of employment to his detriment; that the "ad hoc evaluation process" used in an attempt to substantiate the decision of 16 May lacked transparency and did not conform to certain basic requirements of the performance management and appraisal system; and that neither that decision nor the evaluation process showed why the complainant, rather than any other similarly situated staff member, had been

selected for separation on the grounds of tenure. The Council therefore recommended, inter alia, that the Director-General consider reinstating him. However, its recommendations were rejected by the Director-General, who informed the complainant in a letter of 19 February 2004 that he had decided to reject his appeal. That is the impugned decision.

B. The complainant contends, firstly, that the non-renewal decision is illegal because it does not comply with the obligation properly to substantiate a decision. The Director-General did not indicate his reasons for rejecting the recommendations of the Appeals Council. Furthermore, 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. According to the complainant, the Director-General's failure to disclose the actual reasons for the impugned decision is unacceptable. He points out that in the absence of any apparent criteria, the Appeals Council stated that it was "at a loss as to how the [Director-General's] decision [might] be scrutinised in order to determine whether or not the [complainant's] rights ha[d] been infringed".

Secondly, the complainant contends that the non-renewal 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 in 2001 and which constituted a fundamental and adverse change to his conditions of employment. He asserts that when he signed his contract in 2001, he was not aware that his appointment might not be renewed on the grounds of an annual staff turnover requirement. Moreover, his contract would undoubtedly have been renewed for one year, as recommended by the Contract Extensions Board, had the new condition not been introduced. 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 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.

The complainant asks the Tribunal to set aside the decision of 19 February 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 two years' 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 argues that the decision not to renew the complainant's contract, dated 16 May 2003, lapsed and ceased to be appealable when, by the decision of 23 June 2003, he was granted a special extension. Consequently, the complaint is irreceivable, for lack of substance, to the extent that it is directed against a decision originating from the decision of 16 May, which cannot have given rise to any "final decision" within the meaning of Article VII(1) of the Statute of the Tribunal. Noting that the complainant never contested the decision of 23 June 2003, it submits that, to the extent that the complaint is directed against that later decision, it is irreceivable for failure to exhaust internal remedies.

On the merits, the Organisation points out that the complainant had a fixed-term contract and refers to the case law which confirms 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 the director of his division.

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 extension to his contract in 2001, 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 presses his pleas. 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 maintains its objections to receivability and reiterates its position on the merits.

F. In his further submissions the complainant argues that the Tribunal's ruling in Judgment 2407 supports the view that his complaint is receivable. He also endeavours to establish that the impugned decision is tainted with breach of due process, abuse of authority, discrimination and bad faith.

G. In its comments on the complainant's further submissions, the Organisation observes that they add little to the pleas and arguments already presented by him. It considers that its position on the merits has been fully vindicated by Judgment 2407.

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. The circumstances surrounding the non-renewal were almost precisely similar to those which the Tribunal considered and ruled on in Judgment 2407. The only exception is that in the complainant's case an internal appeal was filed which, although favourably viewed by the Appeals Council, was dismissed by the Director-General in the decision presently impugned. That is not a relevant distinction.

2. Following the delivery of Judgment 2407, the Tribunal invited the complainant to file further submissions regarding the possible application of that judgment to the present case. The complainant accepted that invitation but the materials filed do not respond to the Tribunal's invitation other than on the question of receivability, where he correctly invokes Judgment 2407 to rebut the Organisation's argument, identical to the one it made in that case, to the effect that the complaint is not receivable. For the most part the complainant simply maintains the same arguments as in his original brief and rejoinder. He reiterates that the impugned decision is flawed by an error of law and is not substantiated. He also considers that by imposing an average rate of staff turnover of one-seventh per annum only two months before his contract was initially to end, the Organisation introduced a fundamental and adverse change to his conditions of employment. In his view, the non-renewal decision offended against the good faith principle. Those arguments were considered and rejected by the Tribunal in Judgment 2407 and the complainant has not shown any good reason why the same result should not be obtained here.

3. Two new points are made by the complainant which do not flow from his original complaint or from the decision in Judgment 2407:

(a) he submits that the first wave of employees laid off for reasons of tenure (including himself) were offered nothing in comparison to others who were laid off later;

(b) he says that the Organisation acted in bad faith because the recommendation for non-renewal, which had been issued while he was absent on a six-week mission, was not communicated to him prior to his leaving on vacation shortly after he returned from that mission.

Neither of these submissions is of a nature to affect the applicability of Judgment 2407.

4. For these reasons as well as those given in Judgment 2407, the complaint, although receivable, should 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