NINETY-NINTH SESSION

Judgment No. 2456

The Administrative Tribunal,

Considering the complaint filed by Mr M.B. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 3 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 Articles II, paragraph 5, and VII 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, a Russian national born in 1959, joined the OPCW on 5 January 1998 under a fixed-term appointment. His initial contract was cancelled and superseded by another, which, having been extended in 2003, was due to expire on 14 June 2004.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 complainant's division director.

By a letter dated 26 February 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 upon expiry. In that same letter he 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. The complainant accepted this offer and his appointment was extended by six months calculated from the date of the notification letter.

On 19 April 2004 the complainant submitted a request for review of "the decision to renew [his] contract for approximately two months only, instead of the normal period [...] of a minimum of one year", which, he said, had been notified to him in the above-mentioned letter of 26 February. He sought permission to appeal directly to the Tribunal in the event of a negative response. He contended that the contested 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.

On 12 May 2004 the Head of the Human Resources Branch sent a letter to the complainant, informing him that the

Director-General had decided to reject his request for review as “misconceived” in that the letter of 26 February did not contain the decision he purported to challenge, to confirm the decision not to extend his fixed-term contract upon expiry, and to authorise 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 non-renewal 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 his division director. 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, concerning his role as Special Adviser to the former Director-General.

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 contracts 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 12 May 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 raises several objections to receivability. It objects to the fact that the complainant asks the Tribunal to refer to a collective brief. It submits 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.

It also argues that the letter of 12 May 2004, which the complainant identifies as the impugned decision, in fact contained two distinct decisions: firstly, the Director-General rejected his request for review on the grounds that it was directed against a non-existent decision and, secondly, he confirmed the initial decision not to extend his fixed-term contract upon expiry. In the Organisation’s view, the letter of 26 February 2004 conveying that initial decision did not contain the offer of a special extension, but merely indicated a willingness to offer one. Consequently, his request for review of the decision – supposedly contained in that letter – to offer him a special extension was without object. For the same reason, it considers the present complaint to be irreceivable to the extent that it is directed against the first of the two decisions conveyed by the letter of 12 May 2004.

As for the second of those decisions, the Organisation describes it as “purely pro forma”, since the initial decision

not to extend his fixed-term contract upon expiry ceased to be appealable when his contract was in fact extended as a result of a new decision, taken only after he had expressed an interest in obtaining a special extension, and conveyed to him in a Personnel Advice note dated 14 April 2004. The Organisation submits that, to the extent that it is directed against that second decision, the complaint is likewise irreceivable, being directed against a decision which is without object. It further points out that the complainant has taken no steps to contest the new decision conveyed to him in the above-mentioned Personnel Advice note.

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 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 extension to his contract in 2003, 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 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 objections to receivability. Referring to Judgment 2407, it maintains that the decision challenged by the complainant 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. The complainant had been Special Adviser to the former Director-General, whose removal from office was the subject of a dispute on which the Tribunal ruled in Judgment 2232, delivered on 16 July 2003. He explains that, following that incident, one of the Organisation's Member States demanded that his contract be terminated immediately. According to the complainant, since that demand could not be met without violating the Staff Rules, the Administration curtailed his authority and functions in an attempt to appease the Member State in question. It then transferred him to the External Relations Division, where he continued to suffer humiliating treatment, until the tenure rule finally provided the new Director-General with an opportunity to terminate his appointment.

The complainant also contends that the non-renewal decision is tainted with errors of fact. He points out that a document dated 26 February 2004 containing data about his performance, on which the Director-General relied in deciding not to renew his contract, contained incorrect information regarding 2002. In addition, it showed the date of his entry on duty as 24 May 1997, instead of 5 January 1998. Given that the Organisation was applying the principle of "first in first out", his separation should not have occurred until 2006.

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, after an earlier period of working for the Organisation's Preparatory Commission, he started working for the OPCW on 5 January 1998. He received an extension of his contract up to 14 June 2004. His position was that of Special Adviser at grade D-1. His division director recommended that his contract be renewed for one further year. On 26 February 2004 he was notified that his contract would not be renewed on its expiry in June 2004, but that he was being offered a special extension of six months calculated from the date of that notification. He was in due course released from the Organisation at the end of that time. His performance record was entirely satisfactory. These facts bear little resemblance to those which the Tribunal emphasised in the quoted passages of Judgment 2408.

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. In particular, he points out that he had been appointed and had served as Special Adviser to the then Director-General, Mr B., on the basis of a three-year fixed-term contract which was due to expire in June 2003. In April 2002, while the complainant was serving in that post, the United States "orchestrated", as he says, Mr B.'s removal from office; that removal was subsequently found by the Tribunal in Judgment 2232 to have been illegal. The complainant alleges that the United States also put pressure on the Organisation to get rid of him as well, and there is at least some evidence to support that allegation. The interference was not all on one side, however, and a high-ranking member of the Russian government also attempted to put pressure on the Organisation on the complainant's behalf. The complainant in fact did not lose his position but continued as Special Adviser to the Acting Director-General until July 2002, when a new Director-General was appointed. The new Director-General transferred the complainant to the External Relations Division as Special Adviser to the director of that division, with effect from 19 August 2002.

7. The complainant says that in his new position he was not treated with the respect he deserves and that he was deprived of certain rights of access to people and places and other privileges, such as the use of a corporate credit card, which he had previously enjoyed and which, in his view, were necessary for the performance of his functions. Even if those allegations were true – and the Tribunal makes no finding in that regard – there is no necessary or demonstrated link between them and the decision of non-renewal which was made only in February 2004. In fact, while in his new post, he was in May 2003 given a further contract extension of one year at the very time when, as Judgment 2407 demonstrates, a large number of staff members were being released as a part of the implementation of the tenure rule and turnover policy. If the Organisation had really been seeking to disembarrass itself of him it would most likely have done so then rather than re-engage him for a further year.

8. Of greater consequence is the complainant's new allegation that the non-renewal decision was in part based on material errors of fact. In a document signed by the Director-General and dated 26 February 2004, it is indicated with regard to the complainant's performance rating that there is "no data" for the year 2002, while in the column "Reviewing Manager PMAS Average Rating" for 2002 the rating is shown as "fully meets". However, the evidence on file indicates that the rating in question was in fact "consistently exceeds" for the first four months of the year, "fully meets" for the next four months and "frequently exceeds" for the last four months. While not minimising the importance of these errors the Tribunal would be reluctant to attach too much significance to them, since it will be recalled that the principal reason for the non-renewal decision was the implementation of the tenure rule and the turnover policy and that performance ratings, so long as they were, like the complainant's, satisfactory, were of relatively minor consequence.

9. That is not the case, however, with a second alleged error appearing in the 26 February 2004 document. It shows the complainant's date of entry on duty as being 24 May 1997, when it was in fact, from his letter of appointment, 5 January 1998. Since in the implementation of its policy the Organisation was said to be applying a "first in, first out" rule, an error of over seven months in the calculation of any employee's length of service may be of critical importance. That is especially the case where such apparent error has the effect of indicating wrongly that the employee would at the time of his separation from the Organisation have served more than seven years. The Tribunal considers the alleged errors of fact to be material.

10. The Organisation was invited by the Tribunal to enter final comments in reply to each of the complainants who had chosen to file further submissions regarding the possible application to their cases of Judgment 2407. It has done so and in this case has limited itself to objections to the scope of the complainant's submissions. It says

that his new allegations go beyond the invitation which was extended by the Tribunal to comment on the possible application of Judgment 2407. This is, in effect, objecting to the form rather than the substance. The objection is in any case unfounded since the Tribunal found no material errors of fact in the decisions impugned in Judgment 2407 and the new allegations thus provide a valid ground for distinguishing the two cases from one another. The Organisation makes no comment on the substance of the complainant's further submissions and the Tribunal can only conclude that it does not take issue with the allegations of fact contained therein.

11. The non-renewal decision must be set aside and the Organisation shall be ordered to pay to the complainant the full balance of salary and benefits to which he would have been entitled if he had received a one-year extension of his contract to 14 June 2005. The complainant must account for any earnings from other employment during that period. The Organisation should pay him moral damages in the amount of 15,000 euros as well as his costs in an amount of 10,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The Organisation shall pay the complainant the full balance of salary and all benefits to which he would have been entitled if he had received a one-year extension of his contract to 14 June 2005, subject to the deduction of any earnings from other employment, as indicated under consideration 11 above.

3. It shall pay him moral damages in the amount of 15,000 euros.

4. It shall also pay him 10,000 euros in costs.

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

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* Their complaints are the subject of Judgments 2452, 2453 and 2454, also delivered this day.

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