V. K.

v.

OPCW

122nd Session **Judgment No. 3680**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms N. V. K. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 23 September 2013 and corrected on 21 November 2013, the OPCW's reply of 12 March 2014, the complainant's rejoinder of 22 April and the OPCW's surrejoinder of 23 July 2014;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant contests the decision not to extend her contract beyond retirement age.

The complainant joined the OPCW in April 2001 as an Editor in the Secretariat of the Policy-Making Organs under a temporary-assistance contract. In April 2002 she was granted a three-year fixed-term contract which was extended several times. The penultimate extension was for a two-year period until 31 March 2013. In August 2012 she was offered a final extension from 1 April 2013 to 24 October 2013 on the ground that, under Interim Staff Rule 4.1.05, a staff member shall not normally be retained in service beyond the age of 62 years, which she would reach on

24 October. The offer indicated that she would be paid her salary and benefits up to 31 October 2013. The complainant questioned the offer with the Human Resources Branch but finally accepted it on 26 September 2012.

On 26 October she requested the Director-General to review his decision to offer her a seven-month extension and not a one-year extension. She contended that this decision was the result of a long process of discrimination, harassment and unfair treatment, which had intensified when she had become involved in Staff Council activities, in violation of her right to freedom of association. By a memorandum of 26 November she was informed of the Director-General's decision to reject her request. On 20 December 2012 she filed an appeal with the Chairman of the Appeals Council.

In its report of 13 June 2013 the Appeals Council concluded that the decision to extend the complainant's contract until 24 October 2013 did not violate any of the Staff Regulations and Interim Staff Rules and recommended that the Director-General reject the appeal.

By a letter of 27 June 2013 enclosing a copy of the Appeals Council's report, the complainant was informed that the Director-General had considered her appeal together with the conclusions and recommendation of the Appeals Council, and had decided to reject her appeal on the ground that his decision on the extension of her contract was legally valid. That is the decision she impugns before the Tribunal.

The complainant asks the Tribunal to set aside the impugned decision and to order the payment of an amount equivalent to the salary and allowances she would have received from 31 October 2013 to 31 March 2014, had she been granted a one-year extension instead of the seven-month extension. She also claims moral damages and costs.

The OPCW asks the Tribunal to dismiss the complaint in its entirety. In its surrejoinder, it submits that any claim made with respect to an alleged breach of the complainant's right to freedom of association is irreceivable for failure to exhaust internal means of redress.

CONSIDERATIONS

1. The complainant challenges the Director-General's decision to grant her a final contract extension of approximately seven months, from 1 April 2013 to 24 October 2013, rather than a twelve-month extension. She attained the age of 62 on 24 October 2013, which is the normal retirement age by virtue of Interim Staff Rule 4.1.05. The complainant had worked on fixed-term contracts with the OPCW from 2002 until 31 March 2013, the last of which was for a term of two years. However, although she questioned the decision to offer her a final extension from 1 April to 24 October 2013, she signed the contract for that last extension on 26 September 2012. In the impugned decision, the Director-General accepted the recommendation of the Appeals Council and rejected her internal appeal in its entirety.

2. An essential issue in the present case is therefore concerned with the exercise of discretion whether to extend a contract of employment beyond retirement age. The relevant provisions are Interim Staff Rules 4.1.05, 4.4.02 and Paragraph 6 of Administrative Directive AD/PER/28 of 9 May 2003 on contract extensions ("the Directive").

3. Interim Staff Rule 4.1.05, which is under the rubric "Retirement", relevantly states as follows:

> "Staff members shall not normally be retained in service beyond the age of sixty-two years. The Director-General may in the interest of the OPCW extend this age limit in individual cases."

Interim Staff Rule 4.4.02 is under the rubric "Expiration of appointments". It states as follows:

> "(a) All appointments shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.
>
> (b) Separation as a result of the expiration of an appointment shall not be regarded as a termination within the meaning of the Staff Regulations and Rules."

Paragraph 6 of the Directive provides as follows:

> "If the Director-General decides that a staff member's contract should be extended, the staff member will normally be offered an extension of one-year. However, the Director-General may decide to offer a staff member an

> extension of a different duration if this is considered to be in the interests of the Organisation."

4. Under these provisions, whether a staff member is retained beyond the retirement age and is given a normal one-year extension, which the complainant seeks, is to be determined by the Director-General if she or he considers that it is in the interests of the OPCW. The Tribunal has provided guidance on how a challenge to the exercise of this discretion is to be determined under similar rules of another international organisation, in Judgment 3521, consideration 4, as follows:

> "4. […]
>
> The decision to allow or deny a prolongation of service [beyond compulsory retirement age] is subject to the assessment by the President of whether such a prolongation is in the interest of the service. Pursuant to its case law, the Tribunal will interfere with such a decision only if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was an abuse of authority (see Judgment 3285, under 9 and 10)."

5. It is in reliance on this statement that the complainant submits that the impugned decision is vitiated by several errors of law. She argues that the decision was taken in breach of an OPCW practice by which un-tenured staff members who, like her, were permanent residents of the Netherlands or Dutch nationals, are allowed to work beyond the statutory retirement age. She also argues that the decision was taken in breach of the principle of equal treatment, and/or in breach of the principle of freedom of association.

6. Factually, the complainant's case may be summarized as follows: at the date on which she was offered the last contract extension (9 August 2012), the OPCW had a practice of allowing Dutch nationals or permanent residents of the Netherlands who were not subject to tenure to work beyond the stipulated retirement age. She was a permanent resident of the Netherlands. The Director-General issued Information Circular OPCW-S/IC/112 on 5 October 2012 stating that, on the recommendation of the Interim Review Committee, he had decided to strictly and uniformly

apply the retirement age provision for staff of the Technical Secretariat. However, this did not apply to her case. It could not have applied to her as the Information Circular was issued after the letter of 9 August 2012, which offered her last contract extension to her 62nd birthday. For the same reason, a memorandum that the Deputy Director-General issued on 21 January 2013 did not apply to her case. That memorandum stated that all staff members who would have attained the retirement age in 2013 and in the future would have, without exception, been granted a contract extension only to the date of their 62nd birthday. There was no reason why the OPCW did not apply to her its practice of allowing Dutch nationals or permanent residents of the Netherlands who were not subject to tenure to work beyond the stipulated retirement age, thereby breaching the practice. Additionally, the OPCW breached her right to freedom of association. The OPCW treated her unequally, because other colleagues benefitted from the practice, and it discriminated against her, bullied her and treated her unfairly on account of her activities on behalf of staff and the positions which she held in the Staff Council.

To some extent the complainant's claims based on breach of the principle of equal treatment and breach of her right to freedom of association are predicated on the existence of the practice, which she asserted that the OPCW had breached.

7. Preliminarily, however, the fact that the complainant signed and accepted her last contract extension brings into consideration the question whether that contract is vitiated on the grounds that the complainant signed it under duress.

8. The complainant states that it was on 30 August 2012 that she received the Director-General's offer to extend her contract to 24 October 2013. She wrote to the Head of the Human Resources Branch on 3 September 2012 requesting a written explanation as to why the recommendation of the Director of the Secretariat of the Policy Making Organs to grant her an extension to 31 December 2013 was ignored. The response, dated 10 September 2012, informed her, in substance, that the Director-General saw no basis for extending her contract beyond her retirement age and requested her to sign and return the last page of her contract extension,

should she wish to accept the offer. She contends that she signed it on 26 September 2012 "under some duress in that she was informed by the Head of Human Resources that, if she did not accept the contract, she would be separated from the Organisation on 31 March 2013".

9. In rejecting a plea of duress, in Judgment 1075, the Tribunal made statements, in considerations 11, 13, 14 and 17, which provide guidance as to when duress might vitiate a signed agreement:

> "11. […]
>
> People are often constrained to make decisions, whether on personal or on financial matters, under pressure of circumstances, but any contractual relations they may enter into while under such pressure will not be void or voidable on that account alone. To succeed in his contention that the agreement may not be enforced against him the complainant must show that the pressure under which he says he acted was unlawful. The pressure he alleges was due to the following circumstances:
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> [...]
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> (3) he was required to sign within twenty-four hours; and
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> (4) he was told that he would not be given the six-month appointment unless he signed the agreement on termination.
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> […]
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> 13. […] (4) – making the grant of the six-month appointment depend on agreement on termination – did not amount to pressure: that was in fact the essence of the offer.
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> 14. The only pressure the ILO applied was circumstance (3), the setting of the time limit. Setting a deadline is a quite normal approach in negotiation and, though it was rather mean-spirited not to let him have the longer time he asked for or at least until the Monday following the long weekend – which would not have been to the Organisation's disadvantage – it was not unlawful. Even the twenty-four hours he acknowledges that he did get left him time to consult family or friends, a staff representative or legal counsel. Actually he does not say how he spent the twenty-four hours at his disposal; perhaps he did get advice. Be that as it may, he is an experienced and well educated man, he chose to sign and he must be held to the bargain. The circumstances he faced if he refused the offer would not have made his position any worse: the status quo would merely have continued.
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> […]
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> 17. The conclusion is that in signing the agreement on 6 September 1989 the complainant was not subject to unlawful pressure, or duress, on the

> ILO's part and that by virtue of that agreement the complainant agreed to the termination of his employment."

10. Taking into consideration the complainant's stated case her plea of duress fails. It cannot vitiate the last contract extension which she signed on 26 September 2012 as there is no evidence that she signed it because she was subjected to unlawful pressure.

11. Moreover it is determined that the complainant also fails on her stated grounds of challenge: breach of practice, and, by extension, breaches of the principles of equal treatment and freedom of association.

12. Consistent precedent has it that while an international organization is obliged to apply its written rules, it must also act in accordance with a consistent practice while that practice is in existence. A staff member may rely on a practice that is created by an announcement, by an administrative circular or otherwise, which is evidence that in the exercise of the discretionary power the head of the organisation will follow a specified administrative procedure. Accordingly, a decision by the executive head of an international organization who has created an established practice in furtherance of the exercise of discretion conferred by a written rule may be vitiated if the decision breaches the existing practice. Thus, it was relevantly stated as follows, in Judgment 1125, consideration 8:

> "[…] A construction which an international organisation wilfully and consistently puts on a rule for years may become a binding element of personnel policy to be applied to everyone who is in the same position in law and in fact. That flows from the general principles that an organisation must show good faith and frame personnel policy in objective terms. Yet it may alter a construction it was not required to follow provided that it does not thereby offend against any of its written rules."

Consistent precedent also has it that the party who seeks to rely on an unwritten rule or practice bears the burden of proving its substance (see, for example, Judgment 2702, consideration 11).

13. It is apparent that at the time when the complainant was offered her last contract extension there was a practice concerning the extension

of contracts of staff members which took them beyond their retirement age of 62 years. The complainant states that this was confirmed in the Director-General's Information Circular OPCW-S/IC/112 on 5 October 2012. She refers, in particular, to the following statement by the Director-General in that Circular:

> "The fact that contract extensions beyond the normal age for retirement may have been granted to **some staff members** in the past does not constitute a precedent for the future." (Emphasis added.)

14. It is further apparent from words expressed by the Director-General in Information Circular OPCW-S/IC/112 of 5 October 2012, that from the date of that Circular he intended to have ended the practice by which some staff members were granted extensions beyond the normal retirement age by applying Interim Staff Rule 4.1.05 and to grant no further extensions to staff members of the Technical Secretariat. It is further observed that the subsequent memorandum by the Deputy Director-General, dated 21 January 2013, stated that all staff members who would have attained the retirement age in 2013 and in the future, without exception, would have been granted a contract extension only to the date of their 62nd birthday.

It is clear, however, both from the practice as discerned from the foregoing and from the evidence that only "some staff members", rather than every staff member, who attained the normal retirement age benefited from the practice. The Director-General had retained the discretion to decide whether to extend a contract beyond the normal retirement age. It was not a practice of general application. Moreover, the complainant has not shown that the extension of her contract to 31 March 2014 was in the interest of the OPCW or that the decision not to have extended it until that date was made in breach of the practice given the Director-General's discretion. The claim of breach of practice is therefore unfounded and will be dismissed.

15. The basis on which it is determined that the claim of breach the principle of equal treatment is unfounded is reflected in the following statements in Judgment 2377, considerations 3 and 4, which considered

the IAEA's Provisional Staff Regulation 4.05, which is similar to the OPCW's Interim Staff Rule 4.1.05:

> "3. The crux of his second complaint is that he somehow had a right to have his retirement age, and his appointment, extended beyond the age of 60, and that the Director General erred in failing to find that such an extension was in the best interest of the Agency. He is wrong on both points.
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> 4. The relevant rule is found in Provisional Staff Regulation 4.05 [of the IAEA] which provides:
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> > 'Staff members shall not normally be retained in service beyond the age of sixty-two years or – in the case of staff members appointed before 1 January 1990 – sixty years. The Director General may in the interest of the Agency extend these age limits in individual cases.'
>
> This text makes it clear that the decision whether or not to grant an extension to any particular staff member is peculiarly a matter for the exercise of the Director General's discretion. The Tribunal will only interfere with such exercise on very limited grounds, none of which has been established by the complainant. The fact that such extensions may have been granted to a number of other staff members is simply irrelevant in the circumstances. No one has a right to be retained beyond the applicable normal retirement age, which in the complainant's case was 60."

16. The complainant claims, in essence, that the OPCW breached the principle of freedom of association because she was subjected to a long process of discrimination and the breach was the culmination of a prolonged period of harassment and unfair treatment which intensified when she took part in Staff Council activities. She alleges, further, that the breach flows from the conduct of her second-line supervisor who attempted to prevent her re-election as the Chair of the Staff Council and also attempted to manipulate her supervisor to give her (the complainant) a negative performance review because of her Staff Council activities.

17. The Tribunal observes, in the first place, that these are matters for which the OPCW provides a mechanism for internal redress which the complainant did not pursue. In the second place, to the extent that the complainant premises this claim on unfair treatment based on the practice of extending the appointment of Dutch nationals and permanent residents of the Netherlands beyond the retirement age, this ground of the claim is unfounded as it has been determined that the claim regarding the breach

of a practice is unfounded. In the third place, the complainant has provided no evidence to link the foregoing allegations to the decision to extend her last contract to her 62nd birthday, rather than to 31 March 2014. Accordingly, the complainant's claim of breach of the principle of freedom of association will be dismissed.

18. In all of the foregoing premises, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ