

**EIGHTY-NINTH SESSION**

***In re Allen***

**Judgment No. 1988**

The Administrative Tribunal,

Considering the complaint filed by Mr Robert Allen against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 11 June 1999 and corrected on 12 October, the OPCW's reply of 30 November 1999, the complainant's rejoinder of 11 February 2000 and the Organisation's surrejoinder of 30 March 2000;

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

Considering the applications to intervene filed by:

V. A. Khers

S. Ahmed

A. Al-Hamdawi

S. Amoura

M. Bîrsanu

D. J. Bonarek

E. Casareno

P. Cermák

M. del C. Chueca Ibáñez

M. Connell

I. Culjak

R. P. Dawadi

I. Doudakov

R. Dururu

E. Farkaš

M. Gonzalez

L. Gorniak

J. Guo

Z. Han

J. L. García Hernández

R. Islam

J. Jiricek

K. J. Keltti

M. Khurlee

K. S. Kim

J. Kledrowetz

K. F. Kouadio

H. Lampalzer

I. Lancaric

S. Laribi

D. N. Le

I. Lee

L. LeMarie

N. Máruntelu

J. McKenzie

D. L. Mears

T. Mikeš

S. Mogl

D. Mohn

V. Mokrousov

S. Mortillaro

Y.-L. Mu

I. Mutibvu

B. Nair

J. A. Ohno

J. G. Osborne

S. Parker

J. Peregrino

O. Rams

H. Reriani

D. Rothbacher

M. Rouzbahani

V. Rutkevich

K. Sayid

A.-M. Sîmoiu

V. Sudhakar

R. Sullivan

C. Takawira

M. Vlasov

B. Whelan

C. Wickramage

W. Wuryani

J. Yang

C. Yepez

J. F. Zhang Considering the letter of 30 March 2000 in which the OPCW indicated that it had no comments to make on the above applications;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. The complainant, an American who was born in 1965, works at the OPCW as an inspector at grade P.3.

At the end of 1997 the Director-General informed the staff of his decision to commission a classification review of most of the existing posts. The review was entrusted to a consultant.

By an internal memorandum of 6 August 1998 the Director-General informed the staff of the results of the review. Attached to the memorandum was a summary table of the recommended reclassification for each of the posts reviewed. On the same day the Director-General convened a meeting of the entire staff at which he announced his decision to apply as such, from 1 January 1999, the results of the review contained in the attachment to the memorandum. On 7 August the Administration published a note entitled "Classification review of posts in the OPCW" which contained the consultant's full report and in which the Director-General notified in greater detail the decision he had announced orally on the previous day. He thus decided, as of 1 January 1999, *inter alia*, to set procedures and guidelines in place so that grade P.3 becomes the entry level for all newly recruited inspectors. Furthermore, he indicated that these procedures and guidelines would also provide for the promotion of such inspectors to grade P.4 after an agreed number of years' experience in the post, and subject to satisfactory performance.

The Executive Council and then the OPCW's Conference of the States Parties at its third Session, held from 16 to 20 November 1998, decided to take a decision on the reclassification of posts at a later stage, in the context of future programme and budget negotiations. Accordingly, the Director-General was asked not to reclassify any posts in the meantime.

Noting on 1 January 1999 that no procedures and guidelines on the promotion of grade P.3 inspectors had been

introduced, the complainant, on 16 March 1999, submitted a request to the Director-General to put in place the procedures and guidelines for the promotion of inspectors, in accordance with his decision of 7 August 1998. By a letter of 17 March the Director-General asked the complainant to allow him an extension of time until 3 May 1999 in order to consider his request to which the complainant tacitly agreed. By a memorandum of 28 May the complainant asked the Director-General to allow him to appeal directly to the Tribunal. By an internal memorandum of 31 May - the impugned decision - the Acting Director-General agreed.

B. The complainant submits that by failing to implement the decision of 7 August 1998 the Organisation made a mistake of law.

In the first place, this decision is lawful. It is based on Regulation 2.1<sup>(1)</sup> of the Interim Staff Regulations, which confers discretionary authority on the Director-General for the classification of posts. Accordingly, neither the Executive Council of the OPCW nor the Conference of the States Parties may oppose the application of a decision to reclassify posts taken by a competent authority. They could no doubt have modified or revoked the authority conferred by the Staff Regulations on the executive head of the Organisation before he notified the decision to the staff. But they did not, so the rule of *patere legem quam ipse fecisti* requires the decision to be applied. The complainant adds that the scope of the Director-General's discretionary authority for reclassification was confirmed by the Organisation's Legal Adviser in an internal memorandum of 22 April 1999.

Furthermore, since neither the Administration nor any member of the staff challenged the decision within the time limit for litigation, it became a final one.

Secondly, the decision of 7 August 1998 undeniably created rights for the complainant since it indicates that the Director-General was to put in place, as from 1 January 1999, rules for the promotion of grade P.3 inspectors, of which the complainant was one, to grade P.4.

Thirdly, by failing to implement the decision in question, the Administration caused the complainant actual injury.

Fourthly, the complainant draws the attention of the Tribunal to the fact that many grade P.3 inspectors at the OPCW are already performing the duties of a grade P.4 inspector, regardless of the number of years they have served or the evaluation of their work.

He asks the Tribunal to quash the Director-General's decision notified by the internal memorandum of 31 May 1999 insofar as it is an implied rejection of his request of 16 March 1999, and to award him costs.

C. In its reply the Organisation submits in preliminary remarks that Regulation 2.1 of the Interim Staff Regulations merely states that the Director-General must take appropriate measures for the classification of posts according to the nature of the duties and responsibilities required. In other words, the provision is unspecific and does not, on its own, determine the Director-General's powers for post classification.

The OPCW explains that, contrary to what the complainant asserts, the Director-General's note of 7 August 1998 does not address promotion as such. In this context promotion must be understood as the consequence of the adjustment of the grade of the incumbent of a post which is to be upgraded. However, this adjustment is not automatic, since promotion as meant in the note is a conditional consequence of the post reclassification.

On receivability, the Organisation submits that the impugned decision does not affect the complainant, since his only objection is the absence, within the time frame set by the Director-General, of proper implementing measures which would have permitted a post reclassification with the consequence that promotion from grade P.3 to P.4 became a possibility for the complainant provided that he met the requirements. The decision of 7 August 1998 means only that the Director-General "decided" to take implementing measures in accordance with the consultant's report. Such a decision is not contrary to the complainant's interests, since he is pursuing exactly the same end.

According to the Organisation, what the complainant is in fact asking of the Tribunal is to enjoin the Director-General to take measures to implement the decision of 7 August 1998. Such a claim is beyond the Tribunal's competence. Besides, such an "injunction" would be *ultra vires* and unjustifiable in view of the decisions taken by the member States and the Executive Council, which led precisely to the suspension of the measures in question. Besides, even if the measures are taken, they will not guarantee the complainant any "right to promotion".

Consequently, the OPCW asks the Tribunal to declare the complaint irreceivable.

On the merits, the OPCW submits that, even if the decision of 7 August 1998 may be considered lawful, the measures needed to implement it remain within the competence of the Organisation's supreme authorities - namely the Conference of the States Parties and the Executive Council - until those bodies have approved them and decided on the necessary financing.

It argues that the decision in question cannot be regarded as final because it was to be followed by implementing measures, which were not taken owing to intervention by the Conference and the Council under authority conferred on them by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

According to the OPCW it is plain that the decision of 7 August 1998 created no rights for the complainant, even if it provides for procedures and guidelines for all newly recruited inspectors to be appointed at grade P.3 (which is not the complainant's case), and allows for the subsequent promotion of such inspectors (which is the complainant's case). The "decision" itself sets conditions and implies the implementation of measures which preclude any automatic entitlement for the complainant.

The defendant denies that the Director-General made a mistake of law by failing to implement the decision of 7 August 1998 "as a result of the decision taken by the ... Council to suspend its implementation and the measures subsequently taken by the Conference".

Lastly, the Organisation argues that the complainant's assertion that many grade P.3 inspectors already perform the duties of a grade P.4 inspector pertains to an issue that cannot be settled in the absence of measures to determine, on the basis of proper procedures and guidelines, the officials whose posts may be reclassified and who may accordingly be eligible for promotion.

It asks for an award of costs against the complainant.

D. In his rejoinder the complainant maintains that his complaint is receivable: the impugned decision is an individual one, it affects him adversely and it bears the characteristics of an actual decision. Moreover, the defendant's plea that the issue of establishing procedures and guidelines providing for grade P.3 inspectors to have access to grade P.4 at the OPCW is still under discussion has no bearing on the receivability of the complaint.

On the merits he contends that Regulation 2.1 is not unspecific: it is the very basis for the Director-General's authority for the classification of posts.

He points out that it is not his intention to deny that there is a hierarchy among the organs of international organisations. However, once certain rules (including delegation of authority to the Director-General) have been set by the policy-making bodies, in particular the Conference of the States Parties, those bodies may not intervene in a matter for which authority was delegated before such delegation was revoked or modified.

Noting that the Conference decided on 2 July 1999 to amend Regulation 2.1 in order to revoke the Director-General's authority to decide on the classification of posts, he points out that his request of 16 March 1999, the impugned decision of 31 May and his complaint, filed on 11 June, all precede the date of the decision to amend that regulation. The material rules are therefore the rules that were in force before the decision of 2 July 1999.

The complainant submits that the Organisation fails to draw the necessary distinction between the establishment, on 1 January 1999, of procedures and guidelines to govern, inter alia, access by grade P.3 inspectors to grade P.4, which forms the central issue of the present case and is automatic, and the complainant's possible promotion following consideration of his case on the basis of those procedures and guidelines, which comes in the wake of the present case but is not a part of it. The complainant points out in this connection that he never submitted that he had a right to automatic promotion, but only to the introduction of procedures and guidelines governing the access of grade P.3 inspectors to grade P.4.

E. In its surrejoinder the Organisation maintains that the complainant has no actual and present interest in his "promotion", since the measure on which he relies is suspended.

It indicates that, on 24 September 1999 the Executive Council, recalling the decision taken on 2 July 1999 by the

Conference of the States Parties, took a decision whereby it entrusted to the Director-General the task of carrying out a new post classification review. The complaint is therefore not only irreceivable but also premature in terms of the merits.

The Organisation presses its plea that there is no decision under which the complainant may claim any right to "promotion" to grade P.4 subsequent to a post reclassification.

### CONSIDERATIONS

1. As in *in re* Dunseth and Mattmann (Judgment 1987 delivered this day), the complainant is an employee of the OPCW who cites the terms of a note issued by the Director-General on 7 August 1998 in order to assert his right to reclassification. However, unlike his colleagues in the above-mentioned case, who invoked the decision to apply changes of grade recommended by a consultant who had reviewed the Organisation's classification of posts, the complainant relies on a paragraph of the note in which the Director-General decided to:

"set procedures and guidelines in place for the P.3 grade to be the entry level for all newly recruited inspectors. These procedures and guidelines will also provide for the promotion of such inspectors, after an agreed number of years' on-the-job experience, and further subject to satisfactory performance, to the P.4 grade."

2. Noting the absence of any procedures or guidelines on the promotion of grade P.3 inspectors to grade P.4, the complainant, who had been recruited in July 1998 at grade P.3, requested the Director-General to review his decision not to implement the note of 7 August 1998. The Organisation raises the same objections to receivability as in the case that gave rise to the above-mentioned judgment, and the Tribunal's response to them is, *mutatis mutandis*, the same as its response in that judgment.

3. As to the merits, the complainant's position in law is different from the one discussed in Judgment 1987. The note of 7 August 1998 provided for the reclassification of the posts, of the officials concerned, to be implemented directly. However, it goes much less far when providing for the establishment of procedures whereby certain categories of officials may, after a number of years' experience on-the-job, have access to a higher grade. To provide for such procedures is undoubtedly very desirable, but the note of 7 August 1998 did not bind the Organisation to any deadline for the preparation of guidelines or to any modalities for the procedure, and created no right to promotion or to reclassification for the staff concerned. In these circumstances, and even if it is a fact that some grade P.3 inspectors perform the duties corresponding to posts at grade P.4, the complainant may claim no right to promotion, nor any right to the establishment, within a specified period, of a procedure to consider his eligibility for promotion to grade P.4. The fact that the note of 7 August stated that the decisions were to take effect from 1 January 1999 did not necessarily imply an obligation for the Administration to put in place procedures from which officials of the complainant's category could in any case only benefit after a number of years' experience.

The complainant can claim no breach of any rights. The Tribunal therefore concludes that the complaint must be dismissed. It finds no reason, in the circumstances, to award costs against the complainant.

### DECISION

For the above reasons,

1. The complaint is dismissed.
2. The Organisation's counterclaim is dismissed.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

1. Regulation 2.1 at the material time read as follows: "In conformity with principles laid down by the Organisation, and in accordance with the master standards of job classification as developed by the International Civil Service Commission, and with due regard for the need for economy and efficiency, the Director-General shall make appropriate provision for the classification of posts according to the nature of the duties and responsibilities required."

Updated by PFR. Approved by CC. Last update: 25 July 2000.