

NINETIETH SESSION

In re Nathan

Judgment No. 2018

The Administrative Tribunal,

Considering the complaint filed by Mr Liston Anthony Nathan against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 16 March 2000 and corrected on 18 April, the OPCW's reply of 23 May, the complainant's rejoinder of 1 July and the Organisation's surrejoinder of 9 August 2000;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a citizen of the Netherlands who was born in 1974, joined the OPCW on 14 April 1998 on a three-year fixed-term appointment as a storage specialist in the Technical Support Branch of the Verification Division at the Organisation's Equipment Store in Rijswijk. He held grade G.3. The first six months of his appointment constituted a probationary period.

The Head of the Technical Support Branch, who was the complainant's second-level supervisor and rating officer, filled out his performance appraisal report and signed it on 25 September 1998. The complainant received it on 1 October, the date it was signed by a countersigning officer. In adverse comments therein the supervisor recommended not extending the complainant's contract, but stated that he "may well be suited to another position in the Organisation". By a memorandum dated 12 October 1998 given to the complainant two days later, the Head of the Human Resources Branch informed him that his appointment would not be confirmed. He gave him sixty days' notice and said that the complainant would be on special leave with full pay during that period. On 22 October the complainant wrote to the Director-General requesting a review of the appraisal and of the decision to end his contract. On 27 November the Acting Director-General replied on behalf of the Director-General confirming the earlier decision.

The complainant appealed to the Appeals Council on 21 December 1998, pleading breach of due process and putting forward five other grounds for appeal. He asked for reinstatement in a different unit in the Organisation. In its report of 18 March 1999 the Appeals Council noted that, at the time the decision was taken not to confirm the complainant's appointment, there was "no special procedure in place for terminating an appointment 'during' or 'at the end of' the probation period", and that, for this reason, the normal procedure for termination set out in Interim Staff Regulation 9.1 and the rules thereunder applied in his case. Accordingly, it considered the memorandum of 12 October to be null and void and recommended paying the complainant an appropriate final settlement. Alternatively, if a final settlement could not be reached, it was of the opinion that a special advisory board, referred to in Regulation 9.1(b), should be convened to consider and report on the case, particularly on the five grounds stated by the complainant which lay outside the Appeals Council's field of competence. It considered that he should be on special leave without pay until the board had issued a recommendation. It also recommended that the Director-General should urgently promulgate an administrative directive on probation rules and procedures.

The Special Advisory Board constituted to hear the complainant's case submitted its report of 7 September 1999 to the Director-General through the Joint Advisory Board. It recommended that the complainant should be paid "full salary and benefits, including Provident Fund contributions" from the time those payments had ceased, and that he should be offered suitable fixed-term employment, on a probationary basis, elsewhere in the Organisation. The Director-General did not endorse the Special Advisory Board's view, and in a letter of 5 November 1999 upheld the decision to end his appointment. Following a request from the complainant, the acting Director-General wrote to him on 23 December 1999 giving him leave to appeal directly to the Tribunal instead of resubmitting his case to the Appeals Council. The complainant cites that letter as the impugned decision.

B. The complainant is challenging the termination of his appointment on six grounds. First, he pleads denial of due process. He submits that, in the absence of a special procedure for terminating an appointment at the end of a period of probation, the normal procedure for termination, set out in Staff Regulations 9.1 and 9.3 and the rules issued thereunder, must apply. The OPCW failed to observe that procedure. Regulation 9.1(a) states that the Director-General is authorised to end a staff member's appointment if "the services of the individual concerned prove unsatisfactory", but Regulation 9.1(b) states that no such termination can take place until a special advisory board has reported on the matter. No such board was convened prior to his receiving notice of termination.

Secondly, he claims that his performance appraisal, on which the decision to terminate his appointment was based, was tainted with prejudice. He was treated in an "abusive and discriminatory" way by some colleagues and his attempts to complain only led to a negative performance appraisal report. He explains that he is of Indian descent and had to bear the brunt of insensitive remarks. His abilities were belittled by his colleagues. Moreover, the day after he was given his performance report he was denied access to the building where he worked, only to be told a few hours later by the Human Resources Branch that he had to return to his workplace.

Thirdly, he argues that there were errors of fact. His supervisor's appraisal of his services was inaccurate. He produces copies of e-mails in which inspectors to whom he issued equipment testified that they were satisfied with his performance.

Fourthly, contrary to his expectations upon recruitment, the OPCW failed to train him on the equipment he had to use. He learned how to operate the machinery by reading the manuals.

Fifthly, contrary to principles upheld by the Tribunal, he received no warning from the OPCW about the consequences of his alleged shortcomings. It did not forewarn him that his job was in jeopardy. He was simply told to socialise more with his colleagues.

Lastly, he takes issue with the OPCW's failure to transfer him to another position, in line with his supervisor's comment in his appraisal report. The Administration denied him that opportunity and handled his case in an unfair manner. He points out that both the Appeals Council and the Special Advisory Board found in his favour.

He claims relief for loss of past and potential earnings, from the time when his appointment was terminated until the date it was due to expire. He also seeks the quashing of his performance appraisal report, reinstatement on a fixed-term contract in a unit other than the Technical Support Branch, compensation for moral injury, and costs.

C. In its reply the Organisation denies that the complainant was deprived of due process. It gave him "every opportunity at every stage in the process to present his case". The OPCW asserts that the Appeals Council, the Special Advisory Board and the Joint Advisory Board all heard his case. In determining which rules applied to his termination the complainant disregarded the fact that he was on probation and that a distinction has to be drawn between the non-confirmation of a probationary contract and the termination of a confirmed contract. He was granted an extra two months' notice in recognition of the fact that the formal notice of termination was sent to him close to the end of the probationary period.

Under Article VIII, paragraph 44 of the Chemical Weapons Convention the paramount consideration in employing staff is to secure "the highest standards of efficiency, competence and integrity". In taking the decision not to confirm the complainant's contract, the Director-General relied on evaluations and recommendations made by the complainant's supervisors, which were "a fair reflection" of the complainant's work. The Organisation submits that the Director-General's decision, which is a discretionary one, was not based on errors of fact: it was "well founded and in the Organisation's best interest".

The OPCW rejects other allegations made by the complainant. He must have been aware that his performance was not adequate; he was warned of his poor performance during the course of the probationary period. He admits to having had at least two meetings with his supervisors, even if he alleges that the only implied criticism was that he should socialise more. He was given the necessary training in his job, and he has failed to prove that the Director-General's decision was motivated by bias. The Organisation was under no obligation to transfer the complainant to a different department, particularly since he had shown no special aptitude for work in any other area.

D. In his rejoinder the complainant points out that Staff Rule 9.1.01(b) defines "termination". The version in force at the time of his dismissal made no reference to probation: it defined termination as "any separation from service

initiated by the Director-General other than completion of a fixed-term contract or summary dismissal for serious misconduct". All cases of separation from service were then required to be examined by a special advisory board before a decision was taken. In his case, the Organisation failed to submit a proposal to terminate his contract to such a board before deciding to end his appointment.

He adds that no formal record was made of the warning he was purportedly given. His immediate supervisors were not his rating officers and had not been asked to give him a formal warning. He was given no periodic reports during the probationary period, nor did he have the opportunity to rebut his appraisal report. He should also have been informed beforehand of the precise reasons for his termination. As the Organisation tacitly concurs in its reply, he was not notified in good time of the decision to end his employment.

He requests the Tribunal to order the defendant to pay him "full salary and benefits, including Provident Fund contributions, for the entire period since such payments ceased". He asks for legal and administrative costs and presses his claim to reinstatement.

E. In its surrejoinder the Organisation points out that, in his letter of 22 October 1998 to the Director-General, the complainant referred to short meetings held in July and August 1998 with his supervisors. It says that his immediate supervisor raised the matter of his less than satisfactory performance with him during those two meetings. Moreover, the complainant had the opportunity to enter a rebuttal against his appraisal report on 1 October 1998, but did not do so at that time.

CONSIDERATIONS

1. The complainant attacks a decision of the Director-General of the Organisation for the Prohibition of Chemical Weapons (OPCW) in respect of the non-confirmation of his appointment after a probationary period and the termination of his employment prior to the expiry of his fixed-term contract.

2. The complainant, a citizen of the Netherlands, joined the OPCW on 14 April 1998 on a fixed-term appointment for three years with a probation period of six months. He held grade G.3 and served as a storage specialist within the Technical Support Branch of the Verification Division until 13 December 1998.

3. On 23 July 1998 the Head of Staff Administration forwarded to the Head of the Technical Support Branch a performance appraisal report, requesting him to make a recommendation concerning the confirmation of the complainant's contract. On 1 October 1998 the Head of the Technical Support Branch gave the report to the complainant. He attributed to him an overall rating of "mediocre", and recommended that the complainant's contract should not be confirmed. On 14 October 1998 the complainant received a memorandum dated 12 October from the Head of the Human Resources Branch informing him of the non-confirmation of his appointment because of his unsatisfactory performance during the probationary period, giving him sixty days' notice. On 22 October 1998 the complainant requested a review of the appraisal and the decision not to confirm his appointment, pursuant to Interim Staff Regulation 11.1 and Provisional Interim Staff Rule 11.2.02(a). On 27 November 1998 the Acting Director-General informed the complainant that, after consideration of his request, it had been decided to confirm the decision set out in the memorandum of 12 October 1998.

4. On 21 December 1998 the complainant filed an appeal to the Appeals Council against the decision to terminate his appointment. The Council determined that, when the decision not to confirm it was taken, the OPCW had "no special procedure in place for terminating an appointment 'during' or at the end of' the probation period". It also determined that, in the absence of a special procedure for terminating such an appointment, the normal procedure for termination as set out in Interim Staff Regulation 9.1 and the rules thereunder applied. The Council recommended to the Director-General that: (1) an appropriate final settlement should be offered to the complainant in compensation for procedural irregularities; (2) alternatively, if a final settlement could not be reached at that stage, the Director-General should appoint a special advisory board, as required under Regulation 9.1(b), to consider and report on the case, and place the complainant on special leave without pay until the Special Advisory Board had considered the question of his termination and made a recommendation - particularly on the five of six grounds of appeal put forward by the complainant which did not fall within the scope of the Appeals Council's jurisdiction; and (3) the Director-General should promulgate an administrative directive on probation.

5. A Special Advisory Board was convened to investigate the matter. It confirmed the Appeals Council's finding that the decision to terminate the appointment of the complainant was null and void because of the Organisation's failure to submit a proposal, in accordance with Regulation 9.1(b), to a special advisory board set up by the Director-General, before taking a decision not to confirm his contract. It further concluded that the complainant had not received a formal warning prior to the decision being taken. The Board determined that informal meetings between the complainant and his supervisors (but not between the complainant and his rating officer) had taken place during the six-month probationary period and certain minor criticisms were expressed at these meetings. As the Staff Regulations in force at the time in no way limited the application of the principles of due process in a manner which excluded staff on fixed-term contracts with probationary periods, the Organisation's failure to issue a warning breached a fundamental principle of international civil service law. The Board also took cognisance of the disregard for the provisions of the relevant administrative directive on performance appraisal and the provisions of the relevant administrative directive on the procedure to be followed in cases of termination of appointment for unsatisfactory services. According to the Board, the former required an appraisal to "take place at the end of the first three months of work corresponding to the period of probation". The complainant's performance appraisal report had not been completed or signed by the Head of the Technical Support Branch until 25 September 1998, just three weeks before the probationary period was due to expire. The Board also found that "neither the rating nor the countersigning officer who recommended the non-confirmation of [the complainant's] contract had sufficient knowledge or understanding of [his] work to form an independent opinion on the subject". They had allowed themselves to rely on second and third-hand information in forming their opinions. The Board also found that the Organisation had failed to maintain a formal record of the complainant's perceived deficiencies. Due to the absence of records of any formal allegations against the complainant and the "polarisation" of allegations which followed in the wake of the decision not to confirm his contract, the Board determined that it was "not in a position to form a firm view on the substantive merits or otherwise of this decision". It stated that the mutual allegations which "had proliferated" since the decision made it impossible for a disinterested observer to decide whether the complainant was in fact as incompetent as he was alleged to have been, or whether the complainant's allegations were in fact founded.

6. On 5 November 1999, after receiving these recommendations, the Director-General informed the complainant that he saw no reason to reconsider the decision communicated by the Acting Director-General on 27 November 1998 and thus he was upholding the decision not to confirm the complainant's appointment. That is the decision now under challenge.

7. The following are the relevant statutory provisions of the Interim Staff Regulations and Provisional Interim Staff Rules which applied at the material time. Regulation 9.1 of Article IX - Separation from service - provided:

"(a) The Director-General may terminate the appointment of a staff member prior to the expiration date of his/her contract if the necessities for the service require abolition of the post or reduction of the staff; if the services of the individual concerned prove unsatisfactory; if the conduct of a staff member indicates that he/she does not meet the highest standards of integrity required by the Organisation; or ...

(b) No termination under subparagraph (a) shall take place until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Director-General."

Rule 9.1.01 - Consideration of termination of appointment, definition of termination and abolition of posts and reduction of staff - stated:

"(a) *Joint Advisory Board*

The Director-General shall not terminate the appointment of a staff member in accordance with the provisions of Regulation 9.1.(a) until the matter has been considered and reported on by the Joint Advisory Board established in accordance with Staff Rule 8.1.02.

(b) *Definition of termination*

A termination within the meaning of the Staff Regulations is any separation from service initiated by the Director-General other than completion of a fixed-term contract or summary dismissal for serious misconduct."

Rule 9.3.01 - Notice of termination - was as follows:

"(a) A staff member whose fixed-term appointment is to be terminated shall be given not less than 60 days' written notice of such termination.

(b) A staff member whose short-term appointment is to be terminated shall be given not less than five days' written notice of such termination or such notice as may otherwise be stipulated in his or her letter of appointment.

(c) In lieu of these notice periods, the Director-General may authorise compensation calculated on the basis of the salary and allowances which the staff member would have received had the date of termination been at the end of the notice period."

8. The Tribunal finds that the complainant has successfully demonstrated that, in the case at bar, there were numerous procedural irregularities which call for its intervention. In agreement with the Appeals Council and the Special Advisory Board the Tribunal finds that the Staff Regulations, Rules and administrative directives in force at the time do not contain specific provisions for the non-confirmation of fixed-term appointments during or at the end of a probationary period. The provisions relating to the termination of fixed-term appointments without probationary periods therefore apply. This finding is supported by a plain reading of Rule 9.1.01(b) which defines termination in the manner described above. The non-confirmation of the complainant's contract falls squarely within this definition.

9. Based on this finding, the OPCW had certain obligations towards the complainant under its statutory provisions:

(1) Pursuant to Regulation 9.1(b), the Director-General was obligated to refer the question of the complainant's termination to a special advisory board appointed by him, before the termination referred to in Regulation 9.1(a) could take place.

(2) Pursuant to Rule 9.1.01, the Director-General could not terminate an appointment in accordance with the provisions of Regulation 9.1(a) until the matter had been considered and reported on by the Joint Advisory Board established in accordance with Staff Rule 8.1.02.

10. In the case at bar, the Director-General did not refer the complainant's termination to a special advisory board or to the Joint Advisory Board prior to actually terminating his contract. The result constitutes a serious procedural flaw.

11. Although the Special Advisory Board and Joint Advisory Board were subsequently convened to report on this matter, this was done further to a recommendation of the Appeals Council after a review of the decision to terminate the complainant's appointment. They were not convened prior to the termination of his appointment, as required by Regulation 9.1 and the related rules, and thus, the Director-General failed to follow the procedures set forth for the termination of an appointment.

12. Furthermore, since the complainant's employment was terminated for unsatisfactory services he should have been given a warning to allow him a chance to improve his performance. No proper warning was given. Both parties referred to two meetings where minor concerns with respect to the complainant's working relationship with co-workers were discussed. Discussions between the complainant and his supervisors (neither of whom was his rating officer) with respect to relatively minor concerns do not constitute a warning so as to make the complainant aware of the risk of dismissal and the need for improvement. Moreover, the performance appraisal report, which was completed by the Head of the Technical Support Branch on 25 September 1998 and which informed the complainant of his unsatisfactory performance and the non-confirmation of his contract, does not constitute proper warning. In providing this document three weeks prior to the termination of the contract, the defendant failed to follow its own administrative directives with respect to performance appraisals which require completion of a report "at the end of the first three months of work corresponding to the period of probation". The Organisation did not fulfill its obligation properly to warn the complainant. The performance appraisal was the first and only indication that the defendant was dissatisfied with the quality of the complainant's work.

13. In the circumstances, the Tribunal finds it unnecessary to take up the complainant's plea that the performance appraisal was based on erroneous facts or that it was tainted by bias, while noting, however, that the Organisation has failed to rebut or refute either of these allegations.

14. The Tribunal also notes that, as early as 9 October 1998, the Organisation's Legal Division advised the Administration of the procedure to be followed in terminating the complainant's appointment. Specifically, in a

memorandum of that date, the Administration was advised of its obligation to set up a special advisory board to investigate the case and to report back to the Director-General. This advice, like the subsequent findings of the Appeals Council and the detailed and devastating findings of the Special Advisory Board, appear inexplicably to have been simply ignored by the Director-General.

15. In the circumstances, the impugned decision cannot stand and must be quashed. The complainant is entitled to be reinstated in his post or in one of an equivalent grade with full salary and benefits (including any salary increases which he would have received if he had not been terminated) to the end of his fixed-term appointment.

16. The complainant is also entitled to costs in the amount of 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision is quashed, and the Organisation is ordered to reinstate the complainant with full salary and benefits (including any applicable increases) to the end of his fixed-term appointment.
2. The Organisation shall pay the complainant's costs in the amount of 2,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet