

NINETY-THIRD SESSION

Judgment No. 2151

The Administrative Tribunal,

Considering the complaints filed by Mr T. M., Mr D. G. M. and Mr J. F. Z. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 17 May 2001 and corrected on 10 August, the OPCW's reply of 19 September, the complainants' rejoinder of 17 October and the Organisation's surrejoinder of 15 November 2001;

Considering the applications to intervene filed by:

V. A. K.

S. A.

A. A.-H.

R.D.J. A.

D.J. B.

P. C.

M. C. I.

M.S. C.

I. C.

R. D.

J.L. G. H.

M. G. R.

L. G.

R. I.

K.J. K.

M. K.

K.S. K.

J. K.

R.E. K.

I. L.

J.H. M.

D.L. M.

S. M.

J.A. O.

S.D. P.

J. P.

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

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

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

A. The three complainants, who are of Czech, Canadian and Chinese nationality respectively, are employed by the OPCW as inspectors at grade P-3.

At the end of 1997 the Director-General of the OPCW 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 1998, 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 so that grade P-3 would become 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 a specified 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.

Challenges to that decision gave rise to Judgments 1987 and 1988, delivered on 12 July 2000.

By a directive of 30 August 2000, the Director-General introduced a mechanism for appealing against the decision of 6 August 1998 on the classification of posts. The grade allocated to a post could be challenged within a period of sixty days, either by the head of the office or division to whom the post's incumbent reports, or by the incumbent of the post at the time of classification. On 12 September the Head of the Human Resources Branch informed all staff by electronic mail that each request to have a post classification reviewed should be accompanied by the job description used in the classification exercise. He indicated that each staff member could request a copy of the relevant job description, the consultant's rating rationale and the applicable master classification standards. One of the complainants requested the above documents and received a description of the inspection team personnel, the consultant's rating for inspectors' posts and the master standard for the classification of Professional and higher category posts. He subsequently received a job description for inspectors at grade P-3, but doubting its validity, on 19 October he sought confirmation from the Head of Human Resources that it was the right one. The latter replied on 24 October that it was not and that it should not have been sent to him.

By an internal memorandum of 27 October 2000 addressed to the Director-General, the same complainant

requested a review of the classification of his post at grade P-3. Forty-two inspectors, including the two other complainants, joined in this request. On 6 December the Director of the Inspectorate Division informed them that the Director-General, in accordance with the recommendation of the Classification Review Committee established by the directive of 30 August 2000, had decided to reject their request. On 13 December 2000 the Head of Human Resources forwarded the Committee's findings to the author of the request, who, in a memorandum of 22 January 2001, requested the Director-General to review his decision or to allow an appeal directly to the Tribunal. By a letter of 21 February 2001, sent to the three complainants and others, the Director-General upheld his decision and waived the internal appeal procedure. That is the impugned decision.

B. The complainants argue that the post classification system established by the International Civil Service Commission should be applied. They have three pleas.

First, the impugned decision is flawed by errors of procedure. As there was apparently no job description for their posts, it could not have been used as a basis for their classification. Moreover, the consultant followed no methodology in classifying their posts, and in particular did not use a system of point rating, but merely explained that the difference in the level of experience justified the difference in grade between P-3 and P-4 inspectors, while recognising that their duties and responsibilities were similar.

Secondly, there was an error of law since contrary to the explanation provided by the consultant, the classification of a post at a particular grade does not depend on the individual "particularities" of the incumbent, such as qualifications, job performance or seniority.

Thirdly, mistaken conclusions were drawn from the facts, since the consultant considered that "the extent of experience has some relationship to the way the work is undertaken and the level of responsibilities that can be assigned to the incumbent of the post". The complainants challenge this statement. There are no different job descriptions for inspectors' posts at grades P-3 and P-4. Moreover, in practice, all inspectors have similar duties regardless of their grade. The complainants cite statements made by the Director of the Inspectorate Division and several colleagues at grade P-5 (team leaders) asserting that grade is not taken into account in the assignment of duties.

They request the Tribunal to set aside the impugned decision and grant them all consequent redress in law. They claim costs.

C. In its reply, the OPCW contests the receivability of the complaints on the grounds that they were not correctly filed within ninety days of the notification of the impugned decision, as required by Article VII, paragraph 2, of the Statute of the Tribunal, since they were corrected only on 10 August 2001.

In subsidiary argument on the merits it contends, firstly, that even though the post description sent to one of the complainants was not the right one, there is no proof that it was used to classify the post. The allegation that there was no job description had already been made to the Classification Review Committee, which did not find that it constituted sufficient grounds to change the classification of the jobs concerned. Furthermore, the consultant's report rebuts the complainants' allegations. The OPCW adds that the point grading system was indeed used to classify the posts of inspectors at grade P-3 by distinguishing them from grade P-4 posts on the basis of the degree of experience required, as the duties were otherwise identical.

With regard to the error of law, the OPCW denies that the individual "particularities" of the incumbents of grade P-3 inspector posts were taken into account in the classification. However, each item in a job description, whether it describes the functions of the post or the qualifications or experience required, is relevant to the classification of the post.

Lastly, the OPCW argues that the complainants failed to distinguish between decisions pertaining to the classification of posts and those relating to staff management. It is normal for staff members to be assigned, on occasion, duties of a level higher than those of their grade. In fact it is allowed by the Interim Staff Rules and does not imply reclassification of the post. The complainants, who were all intervenors in the case that gave rise to Judgment 1988, are attempting to raise again an issue - the promotion of grade P-3 inspectors and the reclassification of their posts at grade P-4 - on which the Tribunal has already ruled.

D. In their rejoinder, the complainants maintain that their complaints were filed and corrected within the time limits

and that the OPCW's plea in this respect is clearly based on a misinterpretation of the Statute and Rules of the Tribunal.

They deny breach of *res judicata*, arguing that the present case differs from the one that gave rise to Judgment 1988.

With regard to the absence of a job description, they point out that the OPCW, although challenging their allegation, does not produce the document in question. In their view, the reference to the recommendation by the Classification Review Committee is not pertinent and is only intended to justify the absence of a job description. Similarly, the arguments put forward by the OPCW do not prove the existence of a point rating system, but merely endeavour to justify its absence. They accuse the consultant of assuming from the beginning that there must be a difference between grade P-3 and grade P-4 posts, thereby depriving the classification exercise of any significance.

With regard to the error of law, the complainants recall that the consultant's report and the OPCW's reply both mention the experience of the "incumbent".

Lastly, they submit that the OPCW, like the consultant, fails to base its conclusions on any reasoning or documented evidence. The indication that staff members may on occasion be assigned to duties of a level higher than their grade is not relevant, particularly since inspectors at grade P-3 perform the same functions as inspectors at grade P-4 on a permanent basis, as noted by the Tribunal in Judgment 1988.

E. In its surrejoinder, the OPCW presses its claims concerning the receivability of the complaints.

On the merits, the OPCW states that it stands by the consultant's methodology, analysis and conclusions, as affirmed by the Classification Review Committee. It recognises that there were gaps in the documentation provided to the Committee. However, taking into account the many mentions made by the consultant of the job descriptions used in the review and the documents provided by the Head of Human Resources, which included copies of vacancy notices containing job descriptions for inspectors, it rebuts the complainants' allegation that they did not receive the job descriptions used in the classification exercise. It adds that a separate point rating was not necessary for grade P-3 inspectors' posts and recalls the case law, according to which the Tribunal will not substitute its own assessment or direct that a new one be made unless it is satisfied on the evidence that there is a fatal flaw. The OPCW adds that the error of law is not proven and says that the complainants have not interpreted the consultant's statements correctly. Furthermore, they have not identified the alleged "mistaken conclusion drawn from the facts".

CONSIDERATIONS

1. At the material time the complainants held posts as inspectors at grade P-3 at the OPCW. Following a classification review of most posts in the Organisation, the results of which were announced on 6 August 1998, their classification at grade P-3 was maintained.
2. Following Judgment 1987, delivered on 12 July 2000, in which the Tribunal confirmed the Director-General's authority regarding the classification of posts for the period in question, the staff were informed that requests for review of the decision of 6 August 1998 could be made by those concerned to the Director-General, who would transmit them to the Classification Review Committee.
3. On 12 September 2000 the Head of Human Resources informed staff that each request for review of the classification of a post should be accompanied by the job description used to classify the post in question and that each staff member could request a copy of the relevant job description, the consultant's rating rationale and the applicable master classification standards. One of the complainants requested the above documents and received, initially, a description of the inspection team personnel, the consultant's rating for inspectors' posts and the master standard for the classification of Professional and higher category posts. He subsequently received a job description for inspectors at grade P-3, but having doubts as to its validity, he asked the Head of Human Resources on 19 October 2000 whether it was the right one. On 24 October 2000 the latter replied that the job description was not correct and should not have been sent to him. On 27 October 2000 the same complainant requested the Director-General to review the classification of his post at grade P-3. Forty-two inspectors, including the other two complainants, joined in this request, which was transmitted to the Classification Review Committee. On 6 December 2000 the Director of the Inspectorate Division informed them that, in accordance with the Committee's

recommendation, the Director-General had decided not to change the grade of their posts. On 22 January 2001 the author of the request for review asked the Director-General to review his decision. By a letter of 21 February 2001 to the three complainants and others the Director-General upheld his decision and waived the internal appeal procedure.

4. That is the decision impugned before the Tribunal in three complaints filed on 17 May 2001 and corrected on 10 August. With minor exceptions the submissions supporting the complaints cover in detail the case of only one of the three. The other two complainants state that they are in the same position as their colleague, and since the OPCW does not demur the Tribunal will accept their statement.

5. The OPCW contends that the complaints are out of time because they were not filed correctly within ninety days of the notification of the impugned decision. But in practice the complaints were filed, as indicated above, on 17 May 2001, that is within the time limit and, although they were not corrected until 10 August 2001, the complainants and their counsel respected the time limit granted by the Registry of the Tribunal, within the scope of its powers and in accordance with the Tribunal's Rules. The plea that the complaints are not receivable cannot therefore succeed.

6. The complainants believe that the Organisation's arguments contain another plea of irreceivability on the grounds that the complaints raise again a matter settled by the Tribunal in Judgment 1988 delivered on 12 July 2000. But the OPCW observes in its surrejoinder that it is not a matter of receivability, and it is right on that score.

7. On the merits, the complainants' pleas are straightforward. They do not deny that decisions concerning the classification of posts lie within the discretion of the Director-General, but rightly recall that, according to the case law, such decisions must not show any procedural flaw or error of law, nor any mistake of fact leading to a mistaken conclusion by the competent authority. In the present case, they submit that the Administration did not provide them with the job description on the basis of which their posts were maintained at grade P-3 and that the only job description supplied was incorrect on several points. They add that in classifying their posts at grade P-3 the consultant followed no methodology but merely explained that the differences in experience between P-3 and P-4 inspectors warranted the difference in grade. They say that this procedural flaw also amounts to an error of law, since the classification of posts must be independent of the individual "particularities" of their incumbents, including their experience. Lastly, they allege that a wrong conclusion was drawn from the facts, as there is much evidence that the duties and responsibilities of inspectors classified at grades P-3 and P-4 are similar and that the complainants mainly perform P-4-level duties.

8. The OPCW concedes that the documentation submitted to the Classification Review Committee was incomplete and that the Committee acknowledged that the job description provided did not concern the complainants. But it insists that there is no proof that the job description was the one used to classify the complainants' posts. Moreover, the Committee did not find sufficient evidence to change the conclusions of the consultant, who stated that detailed job descriptions had been used and who had applied the required methodology in differentiating between the two levels of experience required for grade P-3 and grade P-4 posts.

9. The Tribunal will not undertake a job classification exercise, which lies solely within the authority of the defendant. However, the succession of errors made in this case, as acknowledged both by the Classification Review Committee and the OPCW itself, leaves room for serious doubts concerning the objectivity of the rationale for the classifications that are being challenged. The complainants were entitled to be provided with the job description on which the consultant's recommendation had been based. But the evidence clearly shows that the document supplied to one of the complainants on this matter was incorrect. Even though the Classification Review Committee, which pointed out the error and indicated that "the absence of specific documentation limits the possibilities of reviewing evaluation", considered the evidence insufficient to change the classification made in 1998, the Tribunal finds that the complainants must not suffer any injury from the Organisation's impossibility to reconstitute the elements on which the classification was made. Admittedly, their assertion that they perform P-4 level duties most of the time is not in itself a reason for granting them that grade. Moreover, in the case of inspectors, it is not out of the ordinary for posts at different levels to be differentiated by taking into account objective criteria related to the nature of the functions performed and the experience required to fulfil the respective duties. While it is not the role of the Tribunal, based on the written submissions, to determine whether the three complainants are entitled to be awarded the grade P-4, it has to assess the effects of the errors committed and of the OPCW's inability to indicate precisely the methods followed by the consultant in his recommendation to maintain the complainants' posts at grade P-3. The Organisation must therefore conduct a new procedure for classification of the posts in question and, in the light

of objective considerations made known to the complainants, reach lawful decisions, it being understood that their claims are not to be considered as challenging the Tribunal's ruling in Judgment 1988, the cause of action of which was different.

10. Having succeeded, the complainants are entitled to costs, which are set at 2,000 euros.

The applications to intervene

11. Twenty-seven OPCW staff members applied to intervene in this case. Article 13, paragraph 1, of the Tribunal's Rules says:

"Anyone to whom the Tribunal is open under Article II of the Statute may intervene in a complaint on the grounds that the ruling which the Tribunal is to make may affect him."

The Organisation opposes the applications of two of the intervenors as irreceivable on the grounds that the decision impugned in this complaint was not addressed to them and that they pursued no internal recourse procedures. In the Tribunal's view, the fact that the two staff members in question filed no internal appeal does not prevent them from applying to intervene (see Judgment 518). The only issue to be resolved is whether the Organisation's decisions on post classification apply to them. The Tribunal observes that their names are not on the list of the staff members to whom the decision of 21 February 2001 was addressed. That being so, this judgment should be extended to them only insofar as they have an interest, on account of their *de jure* and *de facto* position regarding post classification, in benefiting from the Tribunal's decision.

DECISION

For the above reasons,

1. The decision of 21 February 2001 by the Director-General of the OPCW is set aside insofar as it relates to the complainants.
2. The case is sent back to the Organisation for a new decision on their request for classification.
3. The OPCW shall pay the complainants an overall amount of 2,000 euros in costs.
4. The applications to intervene are allowed subject to what is said under 11.

In witness of this judgment, adopted on 10 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

(Signed)

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet

