NINETY-NINTH SESSION

Judgment No. 2452

The Administrative Tribunal,

Considering the complaints filed by Mr K.M.B., Ms S.D., Mr R.H.D., Mr S.H., Mr J.P., Mr A.K.S. and Mr Z.Y. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 3 August 2004, the OPCW's replies of 29 October to the complaints of Mr B., Ms D. and Mr D. and its replies of 5 November to the four other complaints, the complainants' rejoinders of 13 December 2004 and the Organisation's surrejoinders of 18 March 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 complainants are nationals of Finland, Sri Lanka, Bulgaria, Bangladesh, Mexico, India and China, respectively, who joined the OPCW between May 1997 and July 1998. They held fixed-term contracts which, after several extensions, were due to expire at various dates in 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 all of them. 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 for five of the complainants by their respective division directors. In Mr D.'s case, however, his division director recommended non-renewal. He acknowledged that Mr D.'s performance had frequently exceeded expectations, but explained that since the position held by him was to be reoriented, it would in future need to be occupied by a staff member with a different professional background. Mr H.'s division director likewise recommended non-renewal, partly on the basis of the principle of "first in, first out", Mr H. being the longest-serving member of his branch, and partly because changes were envisaged for his particular section.

By letters dated 20 February 2004 or, for Messrs B. and P., 16 March 2004, the Organisation notified the complainants that, pursuant to the decisions of the Executive Council and Conference of the States Parties establishing the tenure rule and the associated turnover policy, their contracts would not be extended upon expiry. In those same letters they were informed that the Director-General was nevertheless prepared to offer them a special extension, between that notification and their actual separation from the Organisation, should they so require. The complainants accepted this offer and their respective contracts were extended, in most cases for a period of six months calculated from the date of the notification letter. Messrs D. and Y. were granted slightly longer extensions based on the operational requirements of the Secretariat.

Between 13 and 16 April 2004 each complainant submitted a request for review of "the decision to renew [his or her] contract for [less than] the normal period [...] of a minimum of one year", which, they said, had been notified to them in the above-mentioned letters of 20 February and 16 March 2004. They sought permission to appeal directly to the Tribunal in the event of a negative response. The complainants contended that the contested decision was not properly substantiated and that it was flawed by an error of law, and they 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 letters to all the complainants, informing them that the Director-General had decided to reject their requests for review as "misconceived" in that the letters of 20 February and 16 March did not contain the decision they purported to challenge, to confirm the decision not to extend their fixed-term contracts upon expiry, and to authorise them to appeal directly to the Tribunal. That is the decision challenged by each complainant.

B. The complainants are all represented by the same counsel, who has submitted a collective brief on their behalf and on behalf of several other complainants.* They contend, 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, they point out that the only reason given to justify the decision not to renew their 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 them to know the actual reasons for the non-renewal of their contracts. Where their division directors had recommended renewal, the Director-General failed to explain why he had decided not to follow those recommendations. According to the complainants, this failure to disclose the actual reasons for the non-renewal of their contracts casts doubt on the legality of those reasons. Indeed, the complainants suggest that, in some cases, it may have been based on hidden reasons.

Secondly, the complainants contend that the non-renewal decision is flawed by an error of law. They argue that the Director-General illegally applied a new condition on contract renewals which was not incorporated in the contracts they signed with the Organisation and which constituted an essential and fundamental change to their conditions of employment. The complainants acknowledge that when they signed their most recent contracts they were aware that the total length of service was seven years. However, they assert that they were not aware that their contracts 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 were they aware of the criteria that would be used to determine who would be selected for non-renewal on that ground. They consider 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. They point 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 complainants ask the Tribunal to set aside the decision of 12 May 2004 and to order the Organisation to reinstate them with retroactive effect as from the date of their 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 their 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, they ask the Tribunal to order the Organisation to pay them the equivalent of two years' gross salary, taking into account step increments and including the post adjustment and all allowances and benefits to which they would have been entitled had their respective contracts been renewed, as well as the Organisation's contribution to the Provident Fund. In addition, each complainant claims 25,000 euros in moral damages and a further award for costs.

C. In its replies the Organisation raises several objections to receivability. It objects to the fact that the complainants ask 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 complaints as irreceivable for failure to observe the Tribunal's procedural rules.

It also argues that the letter of 12 May 2004, which the complainants identify as the challenged decision, in fact

contained two distinct decisions: firstly, the Director-General rejected their request for review on the grounds that it was directed against a non-existent decision and, secondly, he confirmed his initial decision not to extend their fixed-term contracts upon expiry. In the Organisation's view, the letters of 20 February and 16 March 2004 conveying that initial decision did not contain the offer of a special extension, but merely indicated a willingness to offer one. Consequently, their request for review of the decision – supposedly contained in those letters – to offer them a special extension was without object. For the same reason, it considers the present complaints to be irreceivable to the extent that they are 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 their fixed-term contracts upon expiry ceased to be appealable when their contracts were in fact extended as a result of new decisions, taken only after they had expressed an interest in benefiting from a special extension, and conveyed to them in Personnel Advice notes bearing various dates ranging from 2 March to 14 April 2004. The Organisation submits that, to the extent that they are directed against that second decision, the complaints are likewise irreceivable, being directed against a decision which is without object. It further points out that the complainants have taken no steps to contest the new decisions conveyed to them in the above-mentioned Personnel Advice notes.

On the merits, the Organisation points out that the complainants had fixed-term contracts 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 each 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 cases. 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 their personal files, such as performance appraisal reports and the recommendations of their division directors. 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 complainants accepted the extensions to their fixed-term contracts, and that neither the tenure rule nor the turnover policy affected their legal status, which was at all times that of staff members employed under fixed-term appointments 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 complainants. 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 their rejoinders the complainants explain, with regard to the procedural objection raised by the defendant, that since their cases were, initially at least, similar in fact and law, they 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. They maintain their position on the merits. The Tribunal subsequently invited them to make additional submissions in the light of Judgment 2407, which was delivered after they had filed their rejoinders, but none of them did so.

E. In its surrejoinders the Organisation reiterates its objections to receivability. Referring to Judgment 2407, it maintains that the decision challenged by each 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.

CONSIDERATIONS

1. Except for minor differences of detail which the Tribunal considers to be immaterial, the complainants are all similarly situated to each other. The Tribunal orders the complaints joined.

2. The complainants are also similarly situated to those whose complaints were dealt with by the Tribunal in Judgment 2407. Following the delivery of that judgment, the Tribunal invited the complainants to enter additional submissions as to why any of their cases should not be governed by the outcome in that earlier case. None of them has done so.

3. In the Tribunal's view, all questions raised by the pleadings in this matter, whether relating to receivability or to the merits, are governed by the rulings made in Judgment 2407 and the complaints must, for that reason, be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

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

_____* Their complaints are the subject of Judgments 2453, 2454 and 2456, also delivered this day.

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