

## NINETY-NINTH SESSION

**Judgment No. 2462**

The Administrative Tribunal,

Considering the complaint filed by Mr L.C.O. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 27 August 2004, the OPCW's reply of 6 December 2004, the complainant's rejoinder of 24 January 2005 and the Organisation's surrejoinder of 31 March 2005;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant is a former staff member of the OPCW. He is a citizen of Burkina Faso and was born in 1949. He joined the Organisation on 1 August 2000 under a three-year fixed-term contract as Head of Support Services, at grade P-4, in the Procurement and Support Services Branch of the Administration Division.

In December 2002 the Office of Internal Oversight issued a draft report entitled "Audit of the Management of the Travel Function in the Secretariat". It was stated therein that the "role of the Support Services Section in travel function should be reviewed". The report was finalised in March 2003.

In a performance appraisal report covering 2001, the rating regarding the complainant's services was "Fully meets performance expectations". His direct supervisor gave that same rating in the complainant's performance appraisal report covering 2002. The Director of the Administration Division expressed reservations, signing the report on 10 February 2003.

In a memorandum of 28 March, the Acting Head of the Human Resources Branch informed several senior officials that the Contract Extension Board would meet on 1 April 2003 to review the contracts of staff members whose contracts were due to expire. In a memorandum dated 1 April, addressed to the Director of Administration, the complainant's direct supervisor recommended extending the complainant's contract for a period of one year. The Board's conclusion in the case of the complainant was expressed as follows: "The Director of Administration recommended non-extension of the contract in view of the staff member's performance problems, and the new requirements for the post in future". One member of the Board added a dissenting opinion to the Board's minutes.

By a letter of 22 May 2003 the Acting Head of Human Resources informed the complainant that his contract would not be extended when it expired on 31 July 2003. He said that there had been concern about the travel-related operations within the Organisation, that the scope and responsibilities of the post of Head of Support Services were to be redefined, and that the incumbent would, in the future, need to possess "different skills and knowledge" and would need "to act as a more pro-active co-ordinator and planner of the travel-related functions". He told the complainant that in accordance with Administrative Directive AD/PER/28 of 9 May 2003 the Director-General was prepared to offer him "a special extension of up to six months" from the date of his present notification. The complainant was asked to confirm his wishes in writing, otherwise his separation would take place on the expiry of his fixed-term contract in July.

The complainant, in a memorandum of 23 May, accepted the "offer of the Director-General to extend [his] contract for 3 months and 22 days", reserving his right to appeal. On 27 June the complainant requested a review of the decision to extend his contract for that shorter period instead of for the "normal period [...] of one year". The Acting Head of Human Resources informed the complainant by a letter of 25 July that the Director-General was maintaining his decision.

On 2 July 2003 the OPCW advertised the post of Head of Support Services. The complainant applied for the post. The vacancy notice was cancelled in February 2004, and the post was subsequently re-advertised on 29 March 2004.

On 2 September 2003 the complainant filed an appeal with the Appeals Council. His employment with the OPCW ceased on 21 November 2003. In a report drawn up on 14 July 2004, the Appeals Council concluded that in the contract renewal process the Organisation appeared to have acted “on the basis of concerns over the [complainant’s] performance” and not because of a “significant reorganisation affecting the post”, and consequently there was a prescribed procedure that should have been followed for tracking his performance. Being of the opinion that it had not been followed, it considered that the “contract non-renewal was improperly discharged”. The Director-General found that there was no basis for overturning the non-renewal decision. His decision, which the complainant now impugns, was notified to the complainant by letter of 23 July 2004.

B. The complainant states that he is challenging the Director-General’s decision not to renew his contract for the “normal period of one year”. He considers that the reason for not extending it has remained unclear and that the Director of Administration’s recommendation to the Contract Extension Board was not substantiated. Initially, his performance appeared to be at issue, but ultimately the Organisation justified the non-extension of his contract by the need to redefine his post. He doubts whether there was a real intention to redefine his post, arguing that the vacancy notice issued on 2 July 2003 was virtually identical to the one issued at the time of his initial recruitment. His main contention is that if his contract was not extended because of his performance, the Organisation did not adhere to the relevant procedure.

He submits that the impugned decision is illegal on three grounds. First, it was based on an obvious mistake of fact. It could not have been based on a need to redefine his post as no significant redefinition of his post had taken place. He considers that the decision to cancel the vacancy notice was merely a reaction to the arguments that he submitted in his internal appeal.

Second, the decision was flawed by breach of due process. He points out that the Appeals Council reached the conclusion that the decision not to renew his contract was improper since the Organisation had not adhered to the written procedures that applied. The Council found that if a staff member’s employment was in jeopardy for reasons of competence or efficiency it was incumbent on the Organisation fully to inform the staff member and to work with the latter to attempt to correct the problem. The complainant claims that, despite that obligation, he has no performance appraisal report for 2003, and no corrective action plan was put in motion.

Third, he argues that false conclusions were drawn from the facts. His performance could not validly warrant the non-renewal of his contract. The overall rating in his report for 2002 was: “Fully meets performance expectations”. Even though the Director of Administration made negative comments in that report, the overall rating remained unchanged.

The complainant contends that he had a reasonable expectation of remaining a staff member for the total seven years of service foreseen in the Staff Regulations and that he suffered material injury. He asserts that the impugned decision caused him moral injury as his performance was questioned without any warranted reason, and says he has been used as a scapegoat for the ineffectiveness of the travel-related operations. Moreover, the Organisation did not let him know that it had re-advertised his post in March 2004, and so he was prevented from reapplying for the position.

The complainant asks the Tribunal to set aside the decision of 23 July 2004. He seeks reinstatement retroactively from the date of his separation, with payment of salary and allowances due, but without the period between separation and the date of “effective reinstatement” being calculated in the seven-year length of service. Failing reinstatement, he claims payment of the equivalent of two years of his gross salary, including the post adjustment and allowances that he would have received if his contract had been renewed, as well as the Organisation’s contribution to the Provident Fund; he also wants step increases taken into account. He claims 25,000 euros in compensation for moral injury, as well as costs.

C. The Organisation replies that the impugned decision lay within the discretion of the Director-General and was in accordance with the rules governing renewal of contracts. It points out that, as stipulated in Staff Regulation 4.4, the OPCW is a non-career organisation and contracts carry no expectation of renewal. It denies that the impugned decision was unlawful.

It argues that the complainant’s post was redefined. The need to make substantial changes in the travel operation had been identified during the audit carried out by the Office of Internal Oversight in December 2002. That ultimately led to the complainant’s contract not being renewed. Moreover, the job description of the redefined post

is different in substantial respects from the one relating to the complainant's post. It asserts that the vacancy notice of 2 July 2003 was cancelled for internal reasons, adding that no appointment was made on the basis of that vacancy notice. Another notice was issued on 29 March 2004, but the complainant did not apply for the re-advertised post. The Organisation contends that it was under no obligation to notify the complainant of that vacancy notice.

The OPCW denies that there was anything "improper" in the procedure that led to the non-renewal of his contract. The Contract Extension Board, which met on 1 April 2003, was properly constituted in accordance with Administrative Directive AD/ADM/16/Rev.2 of 2 May 2002. It took into account the recommendation of the Director of Administration as well as a standardised "fact sheet" from the complainant's personnel file. The Director-General decided not to renew the complainant's contract because the scope and responsibilities of the post were to be redefined in the best interest of the Organisation.

Nor can it be said that false conclusions were drawn from the facts. The reason for non-renewal was not based on the complainant's performance. The letter of 22 May 2003 clearly stated why his contract was not being extended. The Director-General was within his rights, as the complainant's contract came to its "natural end", to redefine the requirements of the post and to look for someone with the skills and experience to manage the new requirements of the Support Services Section. It contends that the complainant has not suffered any prejudice.

D. In his rejoinder the complainant maintains his pleas, and argues that there was breach of procedural fairness. Referring to the meeting of the Contract Extension Board, he says that an "obvious situation of conflict of interest" arose, because the Director of Administration attended that meeting in his capacity as a full member of the Board and had to consider the recommendation against renewal which he himself had issued; he was thus both judge and party. The complainant alleges prejudice on the part of the Director of Administration.

E. In its surrejoinder, in preliminary remarks, the Organisation states that the complainant is ignoring the fact that the letter of 22 May made no reference to his personal performance. Rather, it stated that the scope and responsibilities of the post were to be redefined.

It argues that the Director of Administration's participation in the Board's meeting was specifically required under Administrative Directive AD/ADM/16/Rev.2, because he was the director of the division to which the complainant's post belonged. Furthermore, the complainant has not shown that the impartiality of the Director of Administration could be called into doubt. The Organisation claims that it correctly followed its internal procedures and rules.

Explaining why the vacancy notice of 2 July 2003 was cancelled, it states that a change process was being carried out over the entire Administration Division and it became necessary to conduct a further assessment of the duty assignments and staffing needs of the Procurement and Support Services Branch.

## CONSIDERATIONS

1. The complainant is a former staff member of the OPCW. He commenced employment under a three-year fixed-term contract as Head of Support Services on 1 August 2000. His duties were mainly concerned with transport and travel, an area in which he is apparently well qualified as he holds Masters degrees in Air Transportation Economics and in Air Transportation Law. His thesis for the first of those degrees was on the European Computer Reservation System, Amadeus.

2. The complainant's first full year performance management and appraisal system report (referred to within the OPCW as PMAS) was concluded on 28 February 2002. In that appraisal, his immediate supervisor stated that the complainant fully met performance expectations. His second-level supervisor, the Director of Administration, fully concurred in that assessment. In his 2002 full year appraisal report, which was completed in February 2003, his immediate supervisor again stated that the complainant fully met performance expectations. Although that rating was not changed, the Director of Administration said that he considered it generous and that he would have rated the complainant as "partially meeting performance expectations".

3. In his comments in the 2002 appraisal report, the Director of Administration stated that the complainant "need[ed] to be more proactive and show more initiative and a drive towards doing more than the minimum required". He concluded that the complainant would "need to show considerable improvement in the next several

months". However, he did not note any specific deficiencies and he made no concrete proposals for improvement.

4. The complainant disagreed with the comments of the Director of Administration in his 2002 report. There appears to be some basis for his disagreement for, from October 2000 onwards, the complainant had stressed the shortcomings in the travel function in various memoranda and had made specific proposals for its reform, including the centralisation of travel management. And at his immediate supervisor's request, in early 2003 he prepared a detailed proposal for the acquisition by the end of that year of an online travel management system, setting out a precise timetable for procurement, training and deployment. That proposal, dated 17 February 2003, was in line with a draft audit report that was prepared in December 2002 by the Office of Internal Oversight.

5. On 28 February 2003 the complainant was informed by the Director of Administration that the travel function would be centralised and a travel management system procured from the airline company KLM. The complainant indicated that that did not comply with OPCW procurement rules and that, in any event, he considered that it was not practical. As it happened, it emerged on 4 March 2003 that the system could not be procured from KLM but had to be procured through a travel agency.

6. In early April the complainant wrote to his immediate supervisor expressing concern as a result of the remarks made by the Director of Administration in his 2002 appraisal report, and noting that he had not received a work programme for 2003. In the meantime, the complainant's immediate supervisor had recommended that the complainant's contract be extended for one year. That recommendation was made on 1 April 2003, the same day as the Contract Extension Board met to consider the extension of contracts that would terminate that year. The Director of Administration was a member of that Board and participated in its deliberations, including those concerning the complainant. The following is noted in the Board's record of proceedings:

"The Director of Administration recommended non-extension of the contract in view of the staff member's performance problems, and the new requirements for the post in the future, for which skills and knowledge other than those possessed by the incumbent are needed. The Acting Legal Adviser pointed out that the PMAS [report] showed that the staff member 'fully meets' performance expectations.

The Board (minus the Chairperson of the Staff Association) endorsed the Director's recommendation that an extension of the contract should not be offered. The Board also noted the Staff Council Representative's dissent of the recommendation."

7. The Director-General accepted the Board's recommendation and, on 22 May 2003, the complainant was informed that his contract would not be extended but that he would be offered "a special extension" of up to six months. In fact, he was offered an extension of three months and 22 days which ensured that he had six months' notice of termination. He accepted that offer without prejudice to his rights and his appointment came to an end in November.

8. It was stated in the letter of 22 May 2003 informing the complainant that his contract would not be extended that:

"There has been [...] serious concern about the ineffectiveness of the travel-related operations within the Organisation. The Director-General has, therefore, decided to streamline the operations. As part of this reform exercise, the scope and responsibilities of the post of Head, Support Services, will be redefined. In the future, the incumbent will be required to possess different skills and knowledge, as he/she will need to act as a more proactive co-ordinator and planner of the travel-related functions for the Offices/Branches. It is planned, therefore, that the post will be re-advertised."

9. On 27 June 2003 the complainant requested the Director-General to review the decision not to extend his contract. That request was refused on 25 July and the complainant subsequently appealed to the Appeals Council. In the meantime, on 2 July, the post of Head of Support Services was advertised in substantially the same terms as when the complainant was initially recruited. He applied for the re-advertised post but the vacancy notice was subsequently withdrawn. It was advertised again on 29 March 2004, but the complainant, who was not aware of that development, did not apply.

10. Pursuant to a request from the complainant, the Appeals Council recommended on 15 October 2003 that action on the decision not to extend the complainant's contract be suspended pending a final decision on his

internal appeal. That recommendation was rejected.

11. On 14 July 2004 the Appeals Council unanimously concluded that the decision of 22 May 2003 was based on “concerns over the [complainant’s] work performance, rather than a significant reorganisation affecting [his] post”. It further concluded that, as the procedures for tracking his performance had not been followed, the decision not to extend the complainant’s contract was taken improperly. The Director-General did not accept that finding. The complainant was informed by letter of 23 July 2004 that the Director-General considered that there was “no basis for overturning the impugned decision”. The subject of the complaint is the decision of 23 July.

12. It is contended in the complaint that, as found by the Appeals Council, there was no existing proposal for a significant reorganisation requiring the re-advertisement of the complainant’s post and that, to the extent the Director-General’s decision was based on that consideration, there was an obvious mistake of fact. To the extent that the decision was performance related, it is put that there was a breach of due process and clearly false conclusions were drawn from the facts.

13. By way of relief, the complainant asks that the Director-General’s decision of 23 July 2004 rejecting his appeal be set aside and that he be reinstated in his post as from his date of separation without loss of salary or other benefits. In the alternative, he seeks payment of the equivalent of two years’ salary, including post adjustment and other allowances and benefits that he would have received had his contract been extended. Additionally, he seeks 25,000 euros in moral damages plus costs.

#### *The issues*

14. It is not disputed that the complaint is receivable. Nor is it disputed that, although a decision not to grant an extension of contract is discretionary and reviewable only on limited grounds, it may be set aside if it was based on a mistake of fact, if some essential fact was overlooked, if clearly false conclusions were drawn from the facts or if it was not taken in accordance with set procedures. (See Judgments 1262 and 1273.)

#### *Mistake of fact: reorganisation affecting the post*

15. As already indicated, there was no significant difference between the vacancy notice, pursuant to which the complainant was appointed in August 2000, and that which was issued on 2 July 2003 and subsequently withdrawn. The reason offered by the Organisation for its subsequent withdrawal is that “additional reform of the [...] Branch was necessary, and [...] a further assessment of the [...] staffing needs [...] was being carried out”. The only difference that the Organisation points to in the vacancy notice of 29 March 2004 as requiring “different skills and knowledge” is the redefinition of the post to include “recommending, overseeing and implementing all of the new changes required”, instead of “administering existing systems and processes”.

16. According to the letter of 22 May 2003 informing the complainant of the decision not to extend his contract, the “different skills and knowledge” required for the post consisted of the need “to act as a more pro-active co-ordinator and planner”, the very matter which was identified by the Director of Administration as a problem in the complainant’s 2002 appraisal report.

17. The fact that the vacancy notice of 2 July 2003 was issued in substantially the same terms as that pursuant to which the complainant was appointed strongly indicates that, when the Director-General decided, in May of that year, not to extend the complainant’s contract, it was not planned to redefine the post in a manner that required its re-advertisement. At best, there might have been an idea that that might be necessary when operations were streamlined and an online travel management system obtained. That it was no more than an idea as to possible future action is borne out by the fact that it was re-advertised on 29 March 2004, two days before it might be expected that the question of the further extension of the complainant’s contract would be considered if his contract had not terminated in November 2003. Moreover, it appears from a note from the Technical Secretariat to the OPCW Executive Council that the post would not be filled until May 2005 and that the fact that the post has been vacant since November 2003 has resulted in delays in implementing reforms in the Procurement and Support Services Branch.

18. To the extent that the Director-General’s decision was based on the changed or, even, the changing nature of the complainant’s post requiring that it be re-advertised, that situation had not come about in May 2003.

Accordingly, the decision was based on an obvious mistake of fact and must be set aside.

*Due process: performance related matters*

19. Although it is not necessary, it is convenient to add something with respect to the argument that the complainant was denied due process.

20. The fact that the Director-General referred to the need for a more proactive person strongly suggests that, contrary to subsequent contentions, the complainant's performance was a factor in the decision not to extend his contract. And it clearly appears from the terms of the recommendation of the Director of Administration to the Contract Extension Board and the note of the Staff Council representative that the complainant's performance was the primary consideration and the need for different skills the secondary consideration put before the Board.

21. The Organisation correctly contends that it was necessary for the Director of Administration to be a member of the Contract Extension Board considering the complainant's case. (See Administrative Directive AD/ADM/16/Rev.2, paragraph 4(b) and Judgment 2096.) However, the denial of due process was not the Director of Administration's participation in the Board's deliberations, as such, but in the failure to make clear that his recommendation was contrary to that of the complainant's immediate supervisor – which, it seems, was not before the Board – and was based on the remarks he had made in the complainant's 2002 appraisal report which had not been followed by a remedial plan. Further, his recommendation had not been provided to the complainant and, to the extent that it was based on future reorganisation, that was not a matter that had been discussed with the complainant. These are matters which, taken together, can be said to have amounted to a failure of due process, denying the complainant any real opportunity to answer any of the matters put against the extension of his contract.

*Relief*

22. Given that the post previously occupied by the complainant was to be filled by another person in May 2005, an order for reinstatement is not appropriate. And given that his immediate supervisor's recommendation was for a one-year extension and that, by then, it may have been appropriate to re-advertise the post, damages should be limited to one year's gross salary less any net amount earned by the complainant as a result of his employment between 22 November 2003 and 22 November 2004.

DECISION

For the above reasons,

1. The Director-General's decision of 23 July 2004 rejecting the complainant's appeal is set aside.
2. The OPCW shall pay the complainant the balance of one year's gross salary, including post adjustment, step increase and other allowances and benefits that the complainant would otherwise have received, together with interest at the rate of 8 per cent per annum from 22 November 2003 from due dates. It shall also pay the Organisation's contributions to the Provident Fund, for one year.
3. The OPCW shall pay the complainant 25,000 euros in moral damages.
4. It shall pay the complainant's costs in the sum of 10,000 euros.

In witness of this judgment, adopted on 13 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

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