

The Administrative Tribunal,

Considering the complaint filed by Mr H. R. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 8 November 2005 and corrected on 19 December 2005, the OPCW's reply of 7 February 2006, the complainant's rejoinder of 9 March and the Organisation's surrejoinder of 4 April 2006;

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 neither party has applied;

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

A. The complainant, a Dutch national born in 1959, joined the OPCW as a security guard in March 2001. At that time, the Organisation's security guards were recruited under temporary assistance contracts, but it was subsequently decided that 18 fixed-term posts for security guards should be created instead. A vacancy notice was therefore issued on 15 December 2004 inviting applications from both internal and external candidates. The complainant applied, but he was informed on 20 May 2005 that his application had been unsuccessful. He was separated from service upon the expiration of his contract on 28 May.

On 19 July 2005 the complainant requested a review, by the Director-General, of the decision not to select him for a post of security guard. Having completed four years of "good service" under consecutive temporary assistance contracts he believed that he was a suitable candidate. By a letter of 12 August, which is the impugned decision, the Head of Human Resources informed him that the Director-General had decided to uphold the decision of 20 May 2005 on the grounds that the recruitment process complied with the applicable directive on recruitment, that the basic rules of fair and open competition had been adhered to and that "[s]ignificant and relevant differences" had been found between him and the successful candidates.

The complainant then brought his case before a Dutch court in The Hague. The Organisation explained to the court that, within the scope of its official activities, it enjoys immunity from jurisdiction. The Dutch court nevertheless ruled that since the OPCW had entered into a "contract for an indefinite period" with the complainant, it should continue paying his salary.

B. The complainant considers that, according to Article VII of the Statute of the Tribunal, his complaint is receivable, because it was filed within ninety days of notification of the impugned decision of 12 August 2005, which constitutes a final decision. In his view, the Tribunal would not comply with the requirements of good faith if it held that the complaint was irreceivable. He points out that, after receiving the letter of 12 August 2005, he sought legal assistance from the Staff Council, which advised him to contact a legal insurance company as it was not qualified to assist him during the appeal procedure and it also told him that, if he wished to appeal, the appeal should be submitted by 12 September 2005. Although he had not received a reply from the insurance company he believed that his case was being dealt with. Meanwhile the deadline for lodging the internal appeal had expired. He submits that the Organisation had a duty to provide him with procedural guidance but failed to do so. Referring to the Tribunal's case law, he adds that the defendant may not plead its own failure to act with regard to the complainant.

He contends that the impugned decision is illegal and flawed. Firstly, he asserts that he was led to believe that he would be offered a fixed-term contract once the Member States had approved the conversion of temporary assistance contracts into fixed-term contracts. At no time was he told that such appointment to a fixed-term post would be subject to tests and interviews. Secondly, he contends that the Organisation failed to follow the established procedure of fair and open competition, in particular because it refused to show him the test results. He met with the Head of the Office of Confidentiality and Security to discuss the reasons for his non-selection but was not given access to his test papers. He adds that his papers were mixed up with those of another candidate. He therefore contends that he was denied due process and that the Organisation's decision to terminate his contract on

28 May 2005 shows bias against him. Such discrimination has placed his family and him in a state of “confusion, agony and disarray”. In addition, he points out that the Organisation has failed to execute the decision of the Dutch court regarding the payment of his salary.

The complainant asks the Tribunal to set aside the impugned decision and to order the Organisation to reinstate him and pay him all the salaries and benefits due with effect from 29 May 2005. He also seeks payment of the sum of 25,000 euros for the “immaterial damage” he has suffered and claims costs in the sum of 10,000 euros.

C. The OPCW objects to the receivability of the complaint on the grounds that the complainant has neither challenged a final decision nor exhausted internal remedies, as required by Article VII(1) of the Statute of the Tribunal. After receiving the Director-General’s reply to his request for review, the complainant sought redress with a Dutch court instead of exhausting internal recourse procedures. It further emphasises that, contrary to the complainant’s assertion, the Organisation has not pleaded its failure to act on any issue at any point in time and that the complainant did not seek procedural guidance from it.

Subsidiarily, the Organisation submits that the complaint is devoid of merit. Citing Staff Regulation 4.1 and Article VIII, paragraph 44, of the Chemical Weapons Convention, it explains that the Director-General enjoys discretionary authority with regard to the appointment of staff members and likewise with regard to the reply to be given to a request for review. Regarding the alleged procedural irregularities in the recruitment process, it provides the Tribunal with the evaluation prepared by the Human Resources Branch on several candidates.

The OPCW rejects the allegation of unjust termination of the complainant’s contract. The latter mistakenly considers that the impugned decision was a “termination” of his contract, whereas his contract was due to expire on 28 May 2005 and could not be renewed, which does not amount to termination according to Interim Staff Rules 4.4.02 and 9.1.01(b).

Moreover, it notes that the complainant has produced no evidence to support his allegation of bias and discrimination, or indeed the allegation that his superiors promised him a fixed-term contract. Lastly, it explains with regard to the execution of the decision of the Dutch court that, according to the Tribunal’s case law, it is not bound by Dutch law.

D. In his rejoinder the complainant presses his argument that his complaint is receivable and maintains that the letter of 12 August 2005 is the Director-General’s final decision on the matter. In support of his allegation of bias and discrimination, he points out that, according to the vacancy notice, candidates had to have a high school diploma, but that it was later decided that shortlisted candidates without such diplomas could be selected. He also notes that the defendant only supplied a copy of the test results and not the test papers. He further produces a copy of a letter of June 2005 addressed to the Director-General, in which several security guards state that their superiors promised them fixed-term appointments.

E. In its surrejoinder the Organisation maintains its objection to receivability and invites the Tribunal to dismiss the complaint summarily in accordance with Article 7(2) of the latter’s Rules. It also expresses the view that a complaint that is devoid of any merit borders on the frivolous and vexatious; it therefore suggests an award of costs against the complainant.

## CONSIDERATIONS

1. The complainant was employed as a security guard by the OPCW on a series of temporary assistance contracts from 1 March 2001 until 28 May 2005, that being the basis on which the Organisation employed security guards during that period. However, the 2005 budget provided for 18 fixed-term posts for security guards. These posts were advertised and were open to internal staff and outside applicants. The complainant was shortlisted for a post but his application was, eventually, unsuccessful. He was so informed on 20 May. His employment came to an end when his contract expired on 28 May 2005.

2. On 19 July the complainant sought a review of the decision not to select him for one of the above-mentioned posts. He was informed on 12 August that the Director-General had decided to maintain the decision of 20 May. The complainant did not then institute internal appeal procedures. Apparently, he sought assistance from the Staff Council and was told that, although it could not recommend legal assistance for an internal appeal, he

could take the matter up with a legal insurer. He was also told that, if he wished to appeal, the appeal should be submitted by 12 September 2005. No appeal was ever submitted. Instead, the complainant commenced proceedings in a Dutch court which, apparently, resulted in an order against the OPCW even though it claimed immunity from jurisdiction. The complainant was unable to enforce the order. He filed his complaint to the Tribunal on 8 November 2005, seeking reinstatement with effect from 29 May 2005, “immaterial damages” and costs.

3. It is contended that the complaint is receivable pursuant to Article VII(3) of the Tribunal’s Statute, it being put that the complaint was filed within ninety days of the Director-General’s decision of 12 August. In that context, the complainant stated that he thought that the legal insurer “had picked up his case and saved the time line [for an internal appeal]”. He also claims that the OPCW should have informed him that he had ninety days from the decision not to appoint him to one of the fixed-term posts within which to lodge a complaint with the Tribunal and that, as he filed his complaint within ninety days of receipt of notification that the Director-General maintained that decision, it would be “incompatible with the requirements of good faith” to hold his complaint irreceivable. These arguments must be rejected.

4. The complainant was clearly informed by the Staff Council that he had to file an internal appeal by 12 September 2005. Having not done so, he cannot rely on Article VII(3) of the Tribunal’s Statute which applies only if “the Administration fails to take a decision upon [a] claim [...] within sixty days”. Here, there was no such failure. A decision was taken, and, then, a further decision was taken on the complainant’s application for review. That latter decision was taken within sixty days of that application.

5. Further, the OPCW was under no obligation to inform the complainant of his “right” to approach the Tribunal within ninety days of the decision not to appoint him to one of the fixed-term posts. There was no such right. The complainant’s only right was to proceed in accordance with the OPCW’s internal appeal procedures and, if that did not result in a decision in his favour, to lodge a complaint thereafter in accordance with Article VII of the Statute of the Tribunal.

6. Article VII(1) of the Statute expressly provides that a complaint is not receivable “unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations”. As the complainant did not pursue an internal appeal, he did not exhaust the available means of resisting the decision not to appoint him to one of the fixed-term posts. Accordingly, as the OPCW contends, the complaint is not receivable.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2006, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

