(Application for review)

102nd Session **Judgment No. 2586**

The Administrative Tribunal,

Considering the application for review of Judgment 2455 filed by Mr G. I. on 5 October 2005 and corrected on 28 January 2006, the reply of 17 March by the Organisation for the Prohibition of Chemical Weapons (OPCW), the complainant's rejoinder of 12 April and the OPCW's surrejoinder of 19 June 2006;

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

Having examined the written submissions;

CONSIDERATIONS

1. On 6 July 2005 the Tribunal delivered Judgment 2455 dismissing a complaint by the present complainant with respect to the non-renewal of his contract with the Organisation. The reason given for the non-renewal was the OPCW's seven-year tenure rule and staff turnover policy. Previously, by Judgment 2407, delivered on 2 February 2005, the Tribunal had dismissed complaints by various former staff members of the OPCW whose contracts had not been renewed as a result of the tenure rule and staff turnover policy. Following the delivery of Judgment 2407, the complainant was invited by the Tribunal to file further submissions regarding the possible application of that judgment to his case, which was still pending. His further submissions reiterated his earlier arguments and introduced two new arguments which the Tribunal held did not affect the applicability of Judgment 2407. The complainant now seeks review of Judgment 2455, and asks the Tribunal to "order measures of investigation [...] or hearing of the parties and witnesses".

2. Before turning to the matters advanced by the complainant, it is convenient to note what was decided by Judgment 2407. As a result of the turnover policy, the contracts of the complainants in that case, as in this case, were not renewed although those of other staff members whose contracts were expiring at or about the same time were. It was said in that case that the selection of those working in the Inspectorate Division, as was the present complainant, was made by the Director-General after a document was prepared by the Acting Director of that Division on the relative performance of all inspectors whose contracts were coming up for renewal. Although the Tribunal called for that document and broadly described its nature in Judgment 2407, it held that it "was properly treated by the Organisation as confidential".

3. The Tribunal pointed out in Judgment 2407 that, in the context of the tenure rule and staff turnover policy, the Director-General was "not choosing whom to let go but rather [...] whom to rehire". It was held that, as the complainants had no right to renewal and no right to be heard on the question of who should be selected for renewal, there was no failure of due process. Moreover, the Tribunal held that, in the circumstances, non-renewal required no justification other than the turnover policy itself. Thus, it was concluded that "[a]s long as there is no evidence of wrongdoing such as personal prejudice, ulterior motive or bad faith [...] the decision-maker must ultimately be allowed to exercise his or her judgement and the Tribunal will not interfere".

4. The complainant raises four distinct issues as justifying review of Judgment 2455: (a) mistakes of fact; (b) failure to have regard to material adduced in his additional submissions; (c) allegedly libellous statements in the judgment; and (d) breach of the Tribunal's procedures.

5. It is contended that it is mistakenly said in Judgment 2455:

"The complainant [...] sent three letters to the Acting Director of the Inspectorate Division, and another to the Acting Head of the Human Resources Branch, asking to be given the reasons for the decision not to renew his contract. Having received no reply to these letters, on 28 May 2003 he submitted a request for review of the

decision of 16 May to the Director-General."

The complainant correctly points out that he requested review of the decision before sending the other letters in which he sought the identity of the decision-maker and the names of the persons who participated in a meeting which resulted in the compilation of lists with respect to the performance of inspectors, not the reasons for the decision.

6. As stated in Judgment 442, the Tribunal will allow review on the ground of "material error, i.e. a mistaken finding of fact which, unlike a mistake in appraisal of the facts, involves no exercise of judgment". For a fact to be material it must be such as to affect the Tribunal's decision. The complainant attempts to establish that the failure to note that he sent the various letters after requesting review of the impugned decision is material to the question whether or not he was accorded due process. However, once it is accepted, as held in Judgment 2407, that there was no right to be heard on the question as to whose contracts should be renewed, the misstatement as to the course pursued by the complainant did not and could not have affected the Tribunal's decision. The complainant's argument is not assisted by reference to the Tribunal's judgments, including Judgment 2315, with respect to the requirement of due process in cases which did not turn on the implementation of the Organisation's staff turnover policy.

7. The complainant also contends that the document to which the Director-General referred before making his decision as to whose contracts would be renewed was not as described by the Tribunal in Judgment 2407. Further, he claims that there were other documents and that the document produced to the Tribunal was fabricated. Assuming, without deciding, that the complainant's allegations could be substantiated, that would still not constitute a material error warranting review of Judgment 2455. As is clear from Judgment 2407, there was "no objective, consistent or strictly rational basis" on which the Director-General could implement the staff turnover policy and his decision could only be interfered with if there was "evidence of wrongdoing such as personal prejudice, ulterior motive or bad faith". The assertions made with respect to the document or documents provided to the Director-General fall far short of evidence of wrongdoing in relation to the actual decision not to renew the complainant's contract. Hence, the misdescription, if any, was not material to the Tribunal's decision.

8. The complainant also contends that the Tribunal overlooked a new fact relied upon in his additional submissions, namely, that contract extensions granted after June 2003, but not the one granted to him, explicitly subjected the contracts to relevant "decisions of the Conference of States Parties and the Executive Council" and, thus, to the staff turnover policy. It is to be recalled that the complainants in Judgment 2407 argued that "it was illegal for the Organisation to add a new term or condition to their contracts of employment". In relation to that argument the Tribunal said:

"The turnover policy, as distinguished from the seven-year tenure rule, was not a term of the contract of any of the staff members. But once the seven-year rule became a part of the terms and conditions of employment [...] its implementation required policy decisions to be made by the Organisation."

The changed terms by which contracts were extended after June 2003 would have been a material consideration only if the Tribunal had proceeded on the basis that the turnover policy had been incorporated into the complainant's contract. It did not, as is clear from its statement that "[t]he circumstances surrounding the non-renewal [of his contract] were almost precisely similar to those which [it] considered and ruled on in Judgment 2407".

9. It is also argued that Judgment 2455 should be reviewed because of the Tribunal's allegedly libellous statement that the complainant "submit[ted] that the first wave of employees laid off for reasons of tenure (including himself) were offered nothing in comparison to others who were laid off later". That statement, which was made in the context of a claim of discriminatory and unequal treatment, is not libellous. In any event, as pointed out in Judgment 442, "the allegedly libellous nature of a judgment affords no grounds for reviewing it". Further, to establish discriminatory and unequal treatment, it would have been necessary for the complainant to show that, in some relevant respect, he was treated less advantageously than those whose contracts were not renewed in the first wave, not those who were laid off later.

10. Lastly, the complainant contends that the Tribunal breached its own procedures, including the *audi alteram partem* principle, in not providing him or his counsel with "the memorandum of the Acting Director of Inspectorate and the fake document" for examination and comment. The Tribunal called for and inspected the document in

question solely for the purpose of determining whether "[i]t was properly treated by the Organisation as confidential". More to the point, as the Tribunal held in Judgment 2407 that there was no right to due process in relation to the question as to whose contracts should be renewed, the failure of the Organisation to produce the document to those who wished to challenge the non-renewal of their contracts was not a breach of due process. And that remained true even after proceedings were brought in the Tribunal, including those brought by the present complainant. There was, thus, no procedural or other requirement that the document in question be provided to the complainant.

11. As already pointed out, the allegations made by the complainant with respect to the document described in Judgment 2407 and the others, which he claims exist, fall far short of providing a basis for holding that, in his case, non-renewal involved "wrongdoing such as personal prejudice, ulterior motive or bad faith". That being so, his application that the Tribunal order investigations or hearings must be rejected. And although the OPCW seeks costs against the complainant, the Tribunal is of the view that that counterclaim should also be rejected.

DECISION

For the above reasons,

1. The application for review of Judgment 2455 is dismissed.

2. The OPCW's counterclaim for costs is also 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 Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Mary G. Gaudron

Giuseppe Barbagallo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.