

111th Session

Judgment No. 3026

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R.S. K. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 6 July 2009 and corrected on 19 October, the OPCW's reply of 27 November 2009, the complainant's rejoinder of 5 March 2010 and the Organisation's surrejoinder of 4 May 2010;

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, a Dutch national born in 1976, joined the OPCW as a Security Guard in the Office of Confidentiality and Security (OCS) in March 2001. After having worked under a series of temporary assistance contracts, he was granted a three-year fixed-term contract at grade GS-3 with effect from 29 May 2005.

From 1 September to 17 October 2006 the complainant was on sick leave. On 18 October he returned to work on a part-time basis, working only day shifts, and on 13 April 2007 he resumed normal duties.

On 8 January 2007 the complainant's supervisor signed his performance appraisal for the period from 1 January to 31 December 2006. For his overall performance he recommended the summary rating "Insufficient", which specifically meant that "The majority of objectives [were] not fully met or the majority of performance dimensions [were] less than fully achieved".* The complainant signed the appraisal that same day, indicating that he disagreed with his supervisor's appraisal. In accordance with Administrative Directive AD/PER/18/Rev.2, which establishes a Performance Management and Appraisal System, the appraisal was then forwarded to the Performance Board, which met on 3 April and 25 June 2007 to review the rating "Insufficient" recommended by the complainant's supervisor. It found that the said rating was adequately justified and decided that it was to be maintained. The second appraising officer signed the appraisal on 27 August 2007. Having taken note of the second appraising officer's comments, the complainant signed the form on 3 September. On 2 November 2007 he initiated the rebuttal process against the rating contained in his 2006 appraisal.

On 19 December 2007 the complainant's supervisor signed his performance appraisal for the period from 1 January to 31 December 2007. He recommended for his overall performance the summary rating "Requiring Some Improvement", which meant that "Many objectives [were] met or exceeded and many performance dimensions [were] fully achieved or exceeded, but critical ones or a significant proportion [were] not". The complainant signed the form on the same day, expressing his agreement with the appraisal. The second appraising officer signed the form on 20 December 2007. The complainant noted the latter's comments and signed the form on 7 January 2008. However, on 4 February 2008 he submitted a rebuttal statement in respect of his 2007 appraisal.

The Rebuttal Panel issued its reports on the complainant's 2006 and 2007 appraisals on 13 February and 4 April 2008 respectively. It

* The relevant performance dimensions were: "Integrity", "Professional Competence" and "Efficiency".

decided that both the rating of “Insufficient” for the 2006 appraisal and that of “Requiring Some Improvement” for the 2007 appraisal were appropriate and should be maintained.

Prior to that, on 12 July 2007, the Head of OCS, responding to a request from the Head of Human Resources, recommended against the renewal of the complainant’s contract on the grounds that his appraisal for 2006 reflected “insufficient performance”. By a letter dated 28 February 2008, which the complainant received the following day, the Head of Human Resources informed him that the Director-General had decided not to offer him an extension of his contract following its expiry on 28 May 2008, on the basis that his performance had been a concern. On 3 March the complainant requested a review of that decision, arguing that as it was based on his appraisal for 2006 it did not take into consideration the improvement documented in his 2007 performance appraisal, nor the fact that a rebuttal process in respect of the 2007 appraisal was still under way. By a letter of 3 April 2008 he was informed that the Director-General had decided to maintain his decision not to offer him an extension of contract. The complainant lodged an appeal with the Appeals Council against the Director-General’s decision on 28 April 2008.

In its report of 12 March 2009 the Appeals Council found that the rating “Insufficient” was appropriate and that the Director-General was therefore within his right in deciding not to renew the complainant’s contract, irrespective of his performance in 2007 or the outcome of the rebuttal process in respect of that year’s appraisal. It criticised the Administration for the time it had taken to finalise the full performance appraisal cycle for the complainant’s 2006 appraisal which, in its view, had precluded the implementation of an improvement plan. It also held that the prescribed three-month notice period had not been respected. The Appeals Council recommended that the Director-General maintain his decision not to renew the complainant’s contract but that he award the complainant fair compensation for failing to give him proper notice of that decision. It also made recommendations of a general character, particularly regarding improvements to the appraisal cycle.

By a letter of 9 April 2009 the complainant was informed that the Director-General had decided to maintain the decision not to renew his contract. With regard to the recommendation for the award of compensation, he was informed that a decision would be communicated to him in due course. On 19 May 2009 the complainant was notified of the Director-General's decision not to award him compensation. In his complaint form the complainant indicates the Director-General's decision of 9 April 2009 as the impugned decision and in his brief he indicates that this decision should be read in conjunction with the decision of 19 May 2009.

B. The complainant argues that the decision not to renew his contract or award him compensation is tainted with errors of law, procedural irregularities, non-consideration of essential facts, as well as breach of general principles of law, the principles governing the international civil service and the Tribunal's case law.

Emphasising that during his many years of service with the Organisation only once, namely after he was placed on sick leave, was his performance considered "Insufficient", he submits that his health condition and the impact it had on his performance were not considered sufficiently. He was unjustly portrayed in his 2006 and 2007 appraisals as being unreliable and having a poor attendance record when, in fact, his absence from work during that time was on certified sick leave. Moreover, the OPCW did not contact his doctor to request information on his condition and, notwithstanding his repeated requests, it failed to establish and provide him with a formal "back-to-work plan".

The complainant contends that his 2006 appraisal did not constitute a sound basis for the decision not to renew his contract and that his improved performance in 2007 should have been taken into account. He considers the recommendation by the Head of OCS against the renewal of his contract to be unfair, especially in light of the positive mid-point review he had received for 2007. He also considers the recommendation to be in breach of due process, given that it had been requested long before his contract was due to expire and before the appraisal cycle had been finalised. He argues that by

deciding not to renew his contract while the rebuttal process in respect of his 2007 appraisal was still under way, the Director-General denied him the benefit of that process.

Referring to the case law, he further asserts that he was not given an adequate opportunity to improve. In this regard he draws attention to the findings of the Appeals Council, which considered that the Organisation had not addressed his alleged underperformance in a valid and meaningful way, mainly because no formal mechanism was available and because the 2006 appraisal cycle had taken far too long to allow his supervisor to establish a performance improvement plan.

Lastly, the complainant submits that the OPCW did not respect the mandatory three-month notice period laid down in Staff Regulation 4.4 read together with Administrative Directive AD/PER/28, and that by so doing it failed in its duty of care towards him.

He asks the Tribunal to quash the impugned decision and to order his reinstatement. He requests material damages equivalent to the salary, emoluments and pension contributions he would have received had his contract been renewed from 29 May 2008 until the date of his reinstatement, together with interest at 8 per cent per annum. He also requests 30,000 euros in moral damages. In the event that the Tribunal decides not to order his reinstatement, he claims compensation equivalent to the salary, emoluments and pension contributions he would have received had his contract been renewed for a period of three years following its expiration on 28 May 2008, together with interest at 8 per cent per annum, and moral damages in the amount of 30,000 euros or an amount to be determined by the Tribunal. He seeks costs for the internal appeal proceedings and the proceedings before the Tribunal in the amount of 20,000 and 15,000 euros respectively.

C. In its reply the OPCW submits that the Director-General's decision not to renew the complainant's contract was taken in the proper exercise of his discretionary authority and in accordance with the applicable rules. It recalls that decisions on the renewal of contracts are subject to limited review and that, especially in cases of non-renewal on account of unsatisfactory performance, the Tribunal

will not substitute the organisation's assessment of the complainant's fitness for duty with its own. It also notes that, as specified in Staff Regulation 4.4, it is not a career organisation and that contracts, including extensions, carry no expectation of renewal or re-employment.

The defendant argues that the complainant's 2006 performance appraisal constituted a sufficient basis for the decision not to renew his contract. It explains that the complainant was made fully aware of the reasons why he had been given the rating "Insufficient" and that, although he received the necessary feedback and guidance, he failed to improve. Consequently, its reliance on the 2006 appraisal, irrespective of his performance in 2007, was in conformity with Administrative Directive AD/PER/18/Rev.2, which provides for non-extension of contract where a staff member receives the rating "Insufficient". It contests the assertion that his performance had been satisfactory up until 2006, noting that he was not subject to the formal appraisal process during the time he was on temporary assistance contracts.

The OPCW denies that the complainant's state of health was not taken into account in the evaluation of his performance, emphasising that his appraisal was made exclusively on the basis of his work performance prior to his sick leave and of a return-to-work programme. It asserts that, contrary to what he alleges, the complainant was provided with a detailed and comprehensive return-to-work programme, which was developed and overseen by the Organisation's Senior Medical Officer. It adds that it was under no obligation to obtain information from the complainant's doctor, especially since his condition had already been assessed by the Senior Medical Officer.

The Organisation rejects the contention that the complainant was not given an adequate opportunity to improve because the 2006 appraisal was only finalised in August 2007. While it acknowledges that there was a delay in obtaining the second appraising officer's signature, it argues that this delay resulted from its strict adherence to the procedure established by Administrative Directive AD/PER/18/Rev.2, which requires that the Performance Board issue its

decision on a recommendation for the rating “Insufficient” before the second appraising officer signs the form. According to the defendant, the complainant was given clear notice of the areas in which his performance needed to improve as early as 8 January 2007, when he received his appraisal for 2006, and was moreover offered assistance in the form of mentoring and coaching.

The OPCW notes that the decision not to renew the complainant’s contract was communicated to him after the Rebuttal Panel had delivered its report on his 2006 appraisal, confirming that the rating “Insufficient” was appropriate. It considers that it complied with due process requirements and that it fully observed the prescribed three-month notice period.

D. In his rejoinder the complainant argues that his performance prior to 2006 must have been at least satisfactory, given that his contract was continuously renewed and he was granted salary increments and ultimately a three-year fixed-term contract. He submits that an organisation has the fundamental obligation to consider a staff member’s most recent appraisal prior to any decision concerning the renewal of his contract and that, accordingly, the defendant should have taken into account his 2007 appraisal. It should therefore have awaited the conclusion of the rebuttal process for that appraisal. He rejects the contention that his performance appraisals gave him “clear notice of the areas in which his performance needed to improve” and reiterates that the Organisation ought to have established a performance improvement plan. In his opinion, the fact that his supervisor made positive comments in his 2007 appraisal, that he recommended him for a salary increment and that he set objectives for 2008 constitute clear indications that the intention was to renew his contract.

E. In its surrejoinder the Organisation submits that its reliance on the complainant’s 2006 performance appraisal as the sole basis for the decision not to renew his contract was lawful and that, in any event, any improvement he may have shown in 2007 was not sufficient to justify a reconsideration of that decision. It explains that the granting

of salary increments during the time he was on temporary assistance contracts does not amount to an acknowledgement that he performed satisfactorily while he held a fixed-term contract, and it notes in this regard that a salary increment was not recommended in his 2006 appraisal. It denies any breach of the duty of care owed to the complainant and points out that, in the absence of any express commitment by the defendant, he could not reasonably or legitimately have expected that his contract would be renewed.

CONSIDERATIONS

1. The complainant is a former staff member of the OPCW. He joined the Organisation as a Security Guard on 1 March 2001 and was initially employed under a series of temporary assistance contracts. On 29 May 2005 he was employed on a three-year fixed-term contract at grade GS-3, again as a security guard. On 29 February 2008 the complainant was informed by a letter dated 28 February 2008 that his contract would not be renewed on its expiry on 28 May of that year. That decision was the subject of an internal appeal. So far as is presently relevant, the Appeals Council recommended that the decision be maintained but that the complainant be paid “fair compensation” because the notice of non-renewal was one day short of the three months required by Administrative Directive AD/PER/28. On 9 April 2009 the Director-General maintained his decision not to renew the complainant’s contract and on 19 May 2009 declined to pay compensation. These are the decisions impugned by the present complaint by which the complainant seeks reinstatement and damages or, in the alternative, compensation in an amount equal to three years’ salary and other benefits, interest and costs.

2. The decision not to renew the complainant’s contract was based on his 2006 performance appraisal in which he was rated “Insufficient”. The Performance Board reviewed that rating in April and June 2007 and concluded that it should be maintained. In July 2007 the Head of OCS recommended that his contract not be renewed because of the rating in that appraisal. The appraisal was later

the subject of a rebuttal process and, in a report dated 13 February 2008, the Rebuttal Panel also concluded that the rating “Insufficient” should be maintained. In the meantime, on 19 December 2007, the complainant’s 2007 performance appraisal was issued. The complainant was given an improved marking of “Requiring Some Improvement”, signifying that “Many objectives [were] met or exceeded and many performance dimensions [were] fully achieved or exceeded, but critical ones or a significant proportion [were] not”. That appraisal was also the subject of a rebuttal process. On 4 April 2008 the Rebuttal Panel reported that the 2007 rating should be maintained.

3. The complainant suffered an illness in 2006 and, as a result, he was absent from work on various occasions in 2006 and 2007, including from 1 September until 17 October 2006. On his return to work on 18 October, he worked half days and only on day shifts, as recommended by the Organisation’s Health and Safety Branch. He resumed normal duties on a normal roster on 13 April 2007.

4. The complainant contends that the decision not to renew his contract or award him compensation involved errors of law, overlooked essential facts and breached general principles of law, the principles governing the international civil service, and the Tribunal’s case law. His arguments are, however, confined to four issues, namely, whether his illness was sufficiently taken into account, whether his improved performance in 2007 should have been taken into account, whether he was given an adequate opportunity to improve and, finally, whether he was given proper notice of the decision not to renew his contract.

5. It is clear that the complainant’s health was taken into account in his 2006 performance appraisal. Indeed, his supervisor

stated in the mid-point review that he had referred the complainant to the Senior Medical Officer “due to concerns over health issues”. The Rebuttal Panel also took the complainant’s health into account. However, the complainant contends that it was insufficiently taken into account. In this regard, he points out that he had worked for the OPCW for nine years and that his 2006 appraisal was the only one in which he was rated “Insufficient”. He also points out that the Organisation did not contact his doctor and, although so requested, failed to produce a formal “back-to-work plan”. It must be assumed that until 2006 the complainant’s work was satisfactory as his contract was renewed from time to time, albeit that he was not subject to performance appraisal during the period he was employed on temporary assistance contracts. Given, however, that the complainant’s supervisor referred him to the Senior Medical Officer who, as pointed out by the Rebuttal Panel, was involved in assessing his health during his absence and “in developing and overseeing [his] subsequent return-to-work programmes”, the failure of the OPCW to consult the complainant’s own doctor does not establish that his health problem was not adequately taken into account in his performance appraisal. Nor does the failure to produce a formal “back-to-work plan”. In this regard, there were apparently different programmes at different times, all supervised by the Senior Medical Officer.

6. The complainant raises one other issue in connection with his illness. He claims that references in his 2006 performance appraisal to his absences from work relate to absences on certified sick leave. This is not correct. It was noted in the mid-point review that “[h]is attendance record [was] poor [...], and he ha[d] failed to follow the laid down procedures when reporting sick, despite being advised to [do so]”. This was prior to his proceeding on sick leave in September 2006. At the end of the year, his supervisor referred to his “increasingly poor attendance record” and observed that on several occasions the complainant had failed to inform either him or the Senior Medical Officer of his inability to attend work. In this respect, the Rebuttal Panel stated that this latter statement was not based on the complainant’s absences on sick leave but “on the terms of the return-

to-work programme”. Although the complainant’s argument that his illness was not sufficiently taken into account must be rejected insofar as it relates to his 2006 performance appraisal, his illness and absence on certified sick leave are matters to be taken into account in relation to the question whether he was given an opportunity to improve his performance.

7. It is well settled that “[a]n organisation may not in good faith end someone’s appointment for poor performance without first warning him and giving him an opportunity to do better” (see Judgment 1583, under 6(a)). Thus, “[a] staff member [...] is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service [and] to have objectives set in advance so that he or she will know the yardstick by which [his or her] future performance will be assessed” (see Judgment 2414, under 23). It is clear that the unsatisfactory aspects of the complainant’s performance were detailed in the mid-point review in his 2006 performance appraisal and detailed in a way that enabled him to know the areas in which he needed to improve his performance. Thus, for example, it was said that there was a need for “[g]reater attention to situational awareness especially when engaged during perimeter rounds and surveillance” and that he was “difficult to contact when required and this must be addressed”. However, the complainant argues that he had no real opportunity to improve until the Performance Board reviewed his rating and the 2006 appraisal was signed by him on 3 September 2007. Additionally, he refers to recommendations in the Appeals Council report for improvements in the timing of the performance appraisal process to deal with underperformance and allow for the establishment of a performance improvement plan. Neither the time taken to complete the 2006 appraisal process nor the recommendations of the Appeals Council can alter the fact that the complainant was made aware of the areas in which he needed to improve at the time of his 2006 mid-point review.

8. An opportunity to improve requires not only that the staff member be made aware of the matters requiring improvement, but,

also, that he or she be given a reasonable time for that improvement to occur. This aspect was considered neither by the Appeals Council nor by the Director-General in his decision rejecting the complainant's request for review of the decision not to renew his contract. Rather, the report of the Appeals Council and the Director-General's decision rejecting the complainant's request for review were directed to the question whether "the procedures and timelines" for the performance appraisal were followed and to the terms of Administrative Directive AD/PER/18/Rev.2. That directive provides that the ratings of "Insufficient" and "Requiring Some Improvement" may lead to one or other of the following measures:

- "(a) Performance improvement plan [...];
- (b) Reassignment to a different post;
- (c) Withholding of the within-grade salary increment;
- (d) Non-extension of contract;
- (e) Termination of appointment for unsatisfactory service."

Although the Administrative Directive allows for the non-extension of a contract in the case of a rating of "Insufficient", it does not and cannot relieve the OPCW of the duty to provide an opportunity for improvement, that being an important aspect of the duty of good faith (see Judgment 2414, under 23, mentioned above). And as the decision not to renew the complainant's contract was based solely on his 2006 performance appraisal, the question whether he was given a fair opportunity to improve must be answered by reference to the situation at the end of that year.

9. As already pointed out, it was noted in the mid-point review in the complainant's 2006 performance appraisal report that his supervisor had referred him to the Senior Medical Officer because of concerns with respect to his health. As the complainant was placed on certified sick leave from 1 September until 17 October 2006, it must be inferred that his health deteriorated after the mid-point review and, as he worked only half days until 13 April 2007, it must also be inferred that he continued to suffer health problems at least until then.

The complainant's return to work on 18 October 2006 allowed him only a few weeks to demonstrate improvement, and to demonstrate it while working only half days. In these circumstances, it must be concluded that by the end of 2006 the complainant had not been given a fair opportunity to improve his performance. And in that context, it must also be concluded, as the complainant contends, that regard should have been had to his improved performance in 2007. These were material matters that were overlooked. It follows that the decision dismissing the complainant's appeal must be set aside.

10. Although the decision dismissing the complainant's appeal must be set aside, it does not follow that he is entitled either to reinstatement or to compensation on the basis that his contract would have been renewed for a further three years. Rather, he is entitled to compensation only on the basis of what would have happened had the Director-General taken a decision on the basis of his performance after he had been given a fair opportunity to demonstrate improvement. In the circumstances, that required the Director-General to have regard to his performance after he returned to normal duties on a normal roster. And he could only do that by having regard to the complainant's 2007 performance appraisal.

11. It is convenient to refer to an argument made on behalf of the Director-General in the internal appeal for the purpose of considering what would have happened if a decision had been taken on the basis of the complainant's performance after he had been given a fair opportunity to improve. That argument was as follows:

"In order to comply with the requirements of AD/PER/28 and respect the required notice period of three months, the decision on the contract renewal needed to be taken and notified to the [complainant] in February 2008. Had the rebuttal panel's decision taken in April 2008 been to assign a higher rating for [his] 2007 [performance appraisal], the Director-General could have reconsidered the decision in light of such eventual new material fact, although, [...] at the time a decision on the [complainant's] contract needed to be taken, the Director-General had sufficient documentation to enable him to make an informed decision."

12. It was implicitly recognised in the above submission to the Appeals Council that the rebuttal process might result in a higher rating of the complainant's performance in 2007 and, thus, necessitate reconsideration of the decision not to renew his contract. As the rebuttal process was already under way in February 2008 and the complainant had, in fact, demonstrated some improvement in 2007, the duty of good faith required the Director-General to extend the complainant's contract until such time as a decision could be taken on the basis of the Rebuttal Panel's decision. However, as the Rebuttal Panel confirmed the complainant's 2007 rating of "Requiring Some Improvement" and that rating also allows for non-extension of a contract, it must be concluded that on delivery of that report on 4 April 2008 the Director-General would then have given the complainant three months' notice of non-renewal of his contract. In these circumstances, the complainant is entitled to compensation only on the basis that his contract would not have been renewed beyond 4 July 2008. The conclusion that he is entitled to compensation on that basis renders it unnecessary to consider the complainant's argument that he was not given three full months' notice of the decision not to renew his contract.

13. The complainant is entitled to compensation in an amount equal to the salary, emoluments and other allowances, including pension contributions, that he would have received on the basis that his contract was extended until 4 July 2008, together with interest at the rate of 5 per cent per annum from due dates until the date of payment. As the initial decision not to renew the complainant's contract was based on his 2006 performance appraisal and as the complainant had not had a fair opportunity to demonstrate improvement by the end of that year, he is entitled to moral damages in the amount of 2,000 euros. He is also entitled to costs in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The Director-General's decisions of 9 April and 19 May 2009 are set aside, as is the earlier decision of 28 February 2008.
2. The OPCW shall pay the complainant the salary, emoluments and other allowances, including pension contributions, that he would have received on the basis that his contract was extended to 4 July 2008, together with interest at the rate of 5 per cent per annum from due dates until the date of payment.
3. The Organisation shall pay the complainant moral damages in the amount of 2,000 euros.
4. It shall also pay him costs in the amount of 1,000 euros.
5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 20 May 2011, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet