H.

v.

OPCW

126th Session **Judgment No. 3992**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. H. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 23 September 2016 and corrected on 17 November 2016, the OPCW's reply of 3 March 2017, the complainant's rejoinder of 13 April and the OPCW's surrejoinder of 12 July, corrected on 18 August 2017;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges a Note sent to all staff concerning a staffing plan.

By Note S/1292/2015 of 30 June 2015 staff were informed of the mid- to long-term staffing plan which had been prepared by the Director-General pursuant to a request of the Conference of the States Parties in November 2012. The staffing plan aimed at rationalising the size of the Technical Secretariat as the OPCW was moving towards a new phase of its work.

On 9 July 2015 the complainant, who was a staff member of the OPCW and Chairperson of the Staff Association, wrote to the Director-General on behalf of the Staff Council expressing concerns about the

content of the Note. On 29 August he submitted a request for review of the Note, contending that it violated Staff Regulation 8(a) concerning the Director-General's obligation to establish and maintain continuous contact and communication with staff regarding issues relating to conditions of work, that it had been issued without the requisite authority, and that it was discriminatory. He stated that he submitted his request on behalf of "all current and future staff members whose terms of appointment [...] may be affected by the Staffing Plan". On 18 September the Director-General rejected his request on the ground that the Note was not an administrative decision. It was nothing more than a proposal. He also considered that the complainant lacked *locus standi* inasmuch as he sought to challenge the Note on behalf of all current and future staff whose terms of appointment might be affected by the staffing plan. He noted that the decision had no direct and immediate effect on the employment status or rights of staff, and that the complainant had failed to identify the persons he was representing. On the merits, the Director-General considered that staff had been consulted, particularly through town hall meetings and a questionnaire that had been sent to all staff. He added that he had been requested by the Conference of the States Parties to issue the staffing plan and hence had the legal authority to do so. He rejected the allegations of discrimination, stressing that no decision had yet been implemented.

On 16 October 2015 the complainant filed an appeal with the Appeals Council against that decision. In its report of 10 June 2016 the Appeals Council recommended rejecting the appeal on the grounds that there was no evidence that the complainant had filed the appeal at the request of the staff. It concluded that all applicable rules had been respected and that the policy-making organs of the OPCW had the requisite legal authority to request the Director-General to develop and issue the staffing plan. It made further recommendations aimed at ensuring that the existing practice of collaboration between staff and the Administration would be maintained.

By a letter of 14 July 2016 the complainant was informed that the Director-General had decided to endorse the Appeals Council's recommendations and to dismiss his appeal. The Director-General

shared the view that collaboration between staff and the Administration was of great benefit, and therefore would actively consider the recommendations made in that respect. That is the decision the complainant impugns.

The complainant asks the Tribunal to set aside Note S/1292/2015 of 30 June 2015 containing the staffing plan and to set aside the impugned decision. He also asks the Tribunal to order that the staffing plan be developed in a lawful manner, whereby the staff are consulted in compliance with Staff Regulation 8, and to order the OPCW not to implement the terms of the contested staffing plan until it has effectively consulted the staff "through the Staff Association". He further seeks an award of moral damages, including for excessive delay in the internal appeal proceedings, and costs. In his rejoinder, the complainant explains that he seeks "moral damages, or [...] material damages, howsoever characterised, to compensate him for the injury caused" by the breach of his right to be consulted and by the unjustified delay.

The OPCW asks the Tribunal to dismiss the complaint as irreceivable on the grounds that it is not directed against a final decision and the complainant lacks *locus standi*. Alternatively, it submits that the complaint should be dismissed as devoid of merit.

CONSIDERATIONS

1. The determinative issue in this complaint is receivability. Although the parties advance a number of arguments pertaining to receivability, the central question is whether the mid- to long-term staffing plan (staffing plan) developed by the Director-General at the request of the Conference of the States Parties and communicated to the staff members in a 30 June 2015 Note from the Technical Secretariat is an administrative decision that is subject to challenge. In the circumstances, it is only necessary to set out the positions of the parties in relation to this question.

2. In summary, the OPCW submits that the staffing plan is merely a proposal and does not constitute an administrative decision subject to challenge. As such, it is not a final decision within the meaning of Article VII, paragraph 1, of the Tribunal's Statute and, accordingly, the complaint is irreceivable.

3. The complainant submits that the complaint is receivable for the following reasons: pursuant to Article II, paragraph 5, of the Tribunal's Statute and the relevant OPCW Rules the Tribunal has the requisite jurisdiction to deal with the complaint; he filed the complaint within the 90-day time limit specified in the Tribunal's Statute; and he exhausted the internal means of redress as stipulated in Article VII, paragraph 1, of the Tribunal's Statute. The complainant disputes the assertion that the staffing plan is merely a proposal. He claims that aspects of the staffing plan "have already been implemented" with significant adverse effects for staff members. In this regard, he identifies several changes made to organizational units and to staff posts following the issuance of the staffing plan, including the announcement in the staffing plan of the abolition of his post.

4. In the rejoinder, the complainant contends that the OPCW misunderstood the nature of the complaint and that the OPCW's breach of its obligation to consult is the impugned conduct. He adds that the setting aside of the "Impugned Staffing Plan" was only sought as a remedy. At this point, it is observed that the record does not support the complainant's assertion regarding the conduct challenged. Having regard to the request for review submitted to the Director-General in which the complainant impugned the 30 June 2015 administrative decision to issue the "Staffing Plan" coupled with the numerous references to the "Impugned Staffing Plan" in the complainant's brief, it is abundantly clear that the "decision" impugned in the internal appeal and the subject of this complaint is the issuance of the staffing plan. It is equally clear that the alleged failure to consult is the ground on which the complainant claimed that the staffing plan was unlawful. Accordingly, the complainant's submissions on receivability grounded on the above erroneous assertion regarding the subject of the impugned

decision will not be considered. In his rejoinder, the complainant also reiterates that the complaint was filed against the Director-General's 14 July 2016 final decision in keeping with Article VII, paragraph 1, of the Tribunal's Statute. In the context of the argument under consideration, this assertion is of no assistance to the complainant. It ignores the fact that the alleged decision challenged in the internal appeal giving rise to the 14 July 2016 decision was the issuance of the staffing plan.

5. Turning to the central question, as discussed below, the staffing plan is not an administrative decision subject to challenge. The staffing plan is just that – a plan developed by the Director-General setting out a proposed structure for the Technical Secretariat that also identifies and proposes the organisational and staffing changes needed to bring about the new structure for the Technical Secretariat. This is illustrated in the following examples taken from the staffing plan that relevantly state: it "provides an overall staffing profile and a proposed structure of the Secretariat for the future"; "[s]taff will continue to be consulted throughout the process of adaptation"; "[p]roposals regarding the Organisation's structure and staff will be kept under constant review and will be submitted to the consideration of the States Parties through the annual Programme and Budget"; "[c]oncerning the review of the top structure positions [...] proposals for changes will need to be submitted to the Conference through the Executive Council for its consideration and approval"; and "[i]t should be noted that this structure may be reviewed in light of internal or external conditions and the progress made in implementing the Convention". At this point, it is also observed that the text of the staffing plan does not include any decision. Moreover, the November 2012 decision of the Conference of the States Parties tasking the Director-General with the development of a staffing plan for the Technical Secretariat required that the implementation of any of the staffing plan proposals must be submitted to the OPCW's policy-making organs for consideration.

6. In conclusion, the complaint is irreceivable and will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 May 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

PATRICK FRYDMAN

DOLORES M. HANSEN

YVES KREINS

DRAŽEN PETROVIĆ