

EIGHTY-NINTH SESSION

In re Dunseth and Mattmann

Judgment No. 1987

The Administrative Tribunal,

Considering the complaints filed by Mr Clifford Dunseth and Mr Olivier Mattmann against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 11 June 1999 and corrected on 17 September, the OPCW's replies of 25 October, the complainants' rejoinders of 16 December 1999 and the Organisation's surrejoinders of 25 January 2000;

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

Considering the applications to intervene filed by:

D. R. Adams

W. Admiraal

I. Akiyama

G. J. Alexander

M. M. F. L. de Almeida

A. Asghar

M. Barbeschi

S. Batsanov

K. Benalla

M. Berdennikov

L. Bijlaard

D. Boudreault

A.-M. Bourke

S. A. P. Braccini

M. Stuart Brass

E. Bravo

O. L. Bustamante

P. Castulik

Z. Chen

D. C. Clagett
G. Coman-Enescu
M. Creighton
T. C. Crocker
A. Daftari
B. Davey
M. Dekker
G. Fleming
J. J. Fons
S. Foulds
H. Garcia
N. Gay
J. Gee
D. Griffin
J. Habibi
J. Hendrikse
L. Hope
Y. Huang
J. Jacobs
S. R. Jowett
P. J. Kara
F. Karoui
D. Kelly-Lukanski
S. Kisselev
P. G. Lavin
L. R. Lemick
M. Louati
J. Makhubalo
M. Mallikarjunan
J.-C. Maltais

R. G. Manley
S. Martens
A. Graham McKenna
S. Mechken
K. Minarikova
S. Mohanna
L. Moran
A. Mwaura
E. O. Napoliello
S. Neault
R. R. Nelson
L. M. Nicolai
F. Patel King
T. J. Ponsenard
J.-P. Proulx
R. Raphail
O. Ratchek-Veriguina
J. Rautenbach
A. Reid
R. J. Rigg
M. R. H. H. Rijks
J.-L. Rolland
J. Ross
T. Ruijgrok
S. T. Shafer
M. W. Smith
R. Stockton
J. E. Sundby
C. Valenzuela
G. R. Van Raalte
M. T. Villarmia

K. Walker

E. M. H. Willemsen

I. Wilson

J. Wiltenburg-Maxwell

J. Wojtylak

G. Yrarli

R. Yepes-Enriquez

Considering the fax of 10 April 2000 in which the OPCW indicated that it had no comments to make on the above applications;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. Mr Dunseth, an American who was born in 1945, works at the OPCW as a Senior Safety Officer (Chemical Weapons) at grade P.4.

Mr Mattmann, who was born in 1967 and is a French citizen, works at the OPCW as a Storage Specialist at grade G.5.

At the end of 1997, the Director-General informed the staff of his decision to commission a classification review of most of the existing posts. The review was entrusted to a consultant.

By an internal memorandum of 6 August 1998, the Director-General informed the staff of the results of the review. Attached to the memorandum was a summary table of the recommended reclassification for each of the posts reviewed. On the same day the Director-General convened a meeting of the entire staff at which he announced his decision to apply as such, from 1 January 1999, the results of the review contained in the attachment to the memorandum. On 7 August the Administration published a note entitled "Classification review of posts in the OPCW" which contained the consultant's full report and in which the Director-General notified in greater detail the decision he had announced orally on the previous day. He thus decided as of 1 January 1999, inter alia, to reclassify posts where the review so recommended and he also undertook to put in place, as of the same date, procedures and guidelines for the promotion of certain categories of officials. The posts to be upgraded included those of the complainants. In fact, according to the results of the review it was recommended that Mr Dunseth's post should be upgraded to P.5 and that Mr Mattmann's post should be upgraded to G.7.

The Executive Council and then the OPCW's Conference of the States Parties at its third Session, held from 16 to 20 November 1998, decided to take a decision on the reclassification of posts at a later stage, in the context of future programme and budget negotiations. Accordingly the Director-General was asked not to reclassify any posts in the meantime.

Noting that their posts had not been reclassified at 1 January 1999, the complainants - Mr Mattmann on 2 February 1999 and Mr Dunseth on 10 February - submitted a request to the Director-General to proceed with the reclassification of their posts in accordance with his decision of 7 August 1998. By letters of 17 March the Director-General asked them to allow him an extension of time until 3 May 1999 in order to consider their request to which they tacitly agreed. By memoranda of 28 and 31 May respectively, Mr Mattmann and Mr Dunseth asked the Director-General to allow them to appeal directly to the Tribunal. By internal memoranda of 31 May - the impugned decisions - the Acting Director-General agreed.

B. The complainants contend that, by failing to implement the decision of 7 August 1998, the Organisation made a mistake of law.

First, this decision is lawful. It is based on Regulation 2.1⁽¹⁾ of the Interim Staff Regulations, which confers discretionary authority on the Director-General for the classification of posts. Accordingly, neither the Executive Council of the OPCW nor the Conference of the States Parties may oppose the application of a decision to reclassify posts taken by a competent authority. They could no doubt have modified or revoked the authority conferred by the Staff Regulations on the executive head of the Organisation before he notified the decision to the staff. But they did not, so the rule of *patere legem quam ipse fecisti* requires the decision to be applied. The complainants add that the scope of the Director-General's discretionary authority for reclassification was confirmed by the Organisation's Legal Adviser in an internal memorandum of 22 April 1999.

Furthermore, since neither the Administration nor any member of the staff challenged the decision within the time limit for litigation, it became a final one.

Secondly, the decision of 7 August 1998 undeniably created rights for the complainants. The results of the classification review, and particularly the summary table, recommended that the complainants' posts should be upgraded, as of 1 January 1999, from grade P.4 to grade P.5 in Mr Dunseth's case and from grade G.5 to grade G.7 in the case of Mr Mattmann.

Thirdly, by failing to execute the decision, the Organisation caused the complainants actual injury.

The complainants ask the Tribunal to quash the Director-General's decisions notified in the internal memoranda of 31 May 1999 in that there are implied rejections of their requests of 2 and 10 February 1999, and to award them costs.

C. In its replies, in preliminary remarks, the Organisation submits that Regulation 2.1 of the Interim Staff Regulations merely states that the Director-General must take appropriate measures for the classification of posts according to the nature of the duties and responsibilities required. In other words, the provision is unspecific and does not, on its own, determine the Director-General's express powers for post classification.

On receivability, the OPCW contends that the impugned decisions did not cause the complainants injury. The decision of 7 August 1998 means only that the Director-General "decided" to take implementing measures in accordance with the consultant's report, which might result in certain posts being upgraded. Such a decision is not contrary to the complainants' interests, since they are pursuing exactly the same end.

According to the Organisation, what the complainants are in fact asking of the Tribunal is to enjoin the Director-General to take measures to implement the decision of 7 August 1998. Such a claim is beyond the Tribunal's competence. It adds that, for the time being the complainants are no longer in a position to seek measures to implement the decision because both the Conference of the States Parties and the Executive Council decided to postpone discussion of the decision itself - on the classification of posts - and its entry into force.

Consequently, the defendant asks the Tribunal to declare the complaints irreceivable.

On the merits, the OPCW submits that even if the decision of 7 August 1998 may be considered lawful, the measures needed to implement it remain within the competence of the Organisation's supreme authorities - namely the Conference of the States Parties and the Executive Council - until those bodies have approved them and decided on the necessary financing.

It argues that the decision in question may not be regarded as final since it was to be followed by implementing measures, which were not taken because the Conference and the Council intervened under the authority conferred on them by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (hereinafter the Chemical Weapons Convention).

It denies that the decision on reclassification - which is a general decision - created any rights for the complainants, since upgrading is subject to two conditions: first, "the incumbent must perform the duties and responsibilities satisfactorily in relation to his post" and secondly, he must meet the requirements for holding a higher-level post.

In conclusion, the defendant denies that the Director-General made a mistake of law by failing to implement the decision of 7 August 1998 "as a result of the decision taken by the ... Council to suspend its implementation and the measures subsequently taken by the Conference".

It asks for an award of costs against the complainants.

D. In their rejoinders, the complainants maintain that their complaints are receivable because the impugned decisions are individual ones, they affect the complainants adversely and they bear the characteristics of actual decisions. Moreover, the defendant's plea that the issue of the reclassification of posts at the OPCW is still under discussion has no bearing on the receivability of the complaints.

On the merits, they contend that Regulation 2.1 is not unspecific: it is the very basis of the Director-General's authority for the classification of posts.

They point out that it is not their intention to deny that there is a hierarchy among the organs of international organisations. However, once certain rules (including delegation of authority to the Director-General) have been set by the policy-making bodies, in particular the Conference of the States Parties, those bodies may not intervene in a matter for which authority was delegated before such delegation was revoked or modified.

Noting that the Conference decided on 2 July 1999 to amend Regulation 2.1 in order to revoke the Director-General's authority to decide on the classification of posts, they point out that their requests of 2 and 10 February 1999, the impugned decisions of 31 May and their complaints filed on 11 June, all precede the date of the decision to amend that regulation. The material rules are therefore the rules that were in force before the decision of 2 July 1999.

Lastly, they submit that the Organisation fails to draw the necessary distinction between the reclassification of their posts as from 1 January 1999, which forms the central issue of the present case and is automatic, and their promotion, which comes in the wake of this case but is not part of it.

E. In its surrejoinders the Organisation maintains that the complainants have no actual and present interest in the reclassification of their posts, since the measure on which they rely is suspended.

It indicates that, on 24 September 1999 the Executive Council, recalling the decision taken on 2 July 1999 by the Conference of the States Parties, took a decision whereby it entrusted to the Director-General the task of carrying out a new post classification review. The complaints are therefore not only irreceivable but also premature in terms of their merits.

The Organisation presses its plea that there is no decision which actually confers on the complainants any right to the reclassification of their posts.

CONSIDERATIONS

1. Following a review of the classification of posts at the OPCW, the Director-General told staff on 6 and 7 August 1998 that he had decided to "implement all the grade changes recommended in the staffing chart attached to the annexed consultant's report". This decision was to take effect on 1 January 1999. However, concerned at the budgetary implications, the member States asked the Director-General in November 1998 not to reclassify any posts pending further discussions on the Organisation's budget and work programme. Subsequently they asked him in July 1999 to commission a new classification review after approval by the Executive Council of its terms of reference and scope. As a consequence, the reclassification of 118 posts recommended by the consultant was not implemented as announced on 6 and 7 August 1998.

2. Two members of the staff of the OPCW whose posts were to be reclassified submitted requests to the Director-General on 2 and 10 February 1999 which were implicitly rejected by decisions allowing them to appeal directly to the Tribunal. They have filed two complaints, which the Tribunal will join.

3. The gist of the complainants' pleas is that rights were conferred on them by the note of 7 August 1998, which they deem to be a lawful and final decision taken by the Director-General in the exercise of his authority which was not subject to any subsequent challenge.

4. In rebuttal, the Organisation raises several objections to receivability. All of them fail. First of all, it submits that the impugned decisions do not injure the complainants since, far from impairing their interests, these are the bases for their claims. That argument would hold only if the complainants intended to challenge the decision contained in the note of 7 August 1998, which is not the case. On the contrary, they rely on that decision to challenge the

Organisation's rejection of their claim to benefit from it. The OPCW appears to concur but then goes on to plead that the complainants have no actual and present interest in challenging the suspension of the implementation of the decision in question, that was decided by the Conference of the States Parties. But the complainants do have an interest in challenging a refusal to implement the reclassification of their posts and entering whatever pleas they like in support: whether or not they may rely on the note of 7 August 1998 is an issue of substance, on which the Tribunal will rule, and not one of receivability. Lastly, the defendant objects to the receivability of their claims to the Tribunal to order the Director-General to satisfy their requests. But it overlooks the fact that when a decision, be it favourable or adverse, affects the career of an international civil servant, the latter may apply to the Tribunal to set it aside. What the complainants are asking the Tribunal here is precisely to set aside the decisions refusing to implement the reclassification of their posts as from 1 January 1999. They are entitled to do so and their complaints are receivable.

5. On the merits, the positions of both parties are clearly argued. The complainants emphasise that the note of 7 August 1998 confirming an internal memorandum of 6 August addressed to the staff, presented the implementation of the changes recommended by the consultant as a decision taken by the Director-General. They submit that the decision fell within the competence of the Director-General by virtue of Regulation 2.1 of the Interim Staff Regulations and that it created rights for the staff members concerned.

In rebuttal, the Organisation recalls that the Director-General's powers must be appraised bearing in mind the authority of the Conference of the States Parties, which, according to Article VIII(19) of the Chemical Weapons Convention, is "the principal organ of the Organisation" and may consider any questions "relating to the powers and functions of the Executive Council and the Technical Secretariat". Since the Director-General is the head of the Technical Secretariat, the Conference had the power to consider matters falling within his competence. Moreover, the Executive Council has responsibility for overseeing the proper functioning of the Convention which includes, if not expressly at least by implication, the need to be able to count on qualified staff. It follows, says the Organisation, that the Director-General could not apply measures to implement his decision of 7 August 1998 until the supreme authorities of the Organisation had approved them or decided on their financing. Accordingly, the decision of 7 August could not be regarded as final and did not create rights for the complainants, particularly as posts could be upgraded only on condition that the incumbents performed their duties satisfactorily and met the requirements for holding a higher post.

6. The Tribunal observes first that, whatever the general supervisory powers of the Conference of the States Parties or the Executive Council, in August 1998 there was no doubt as to the Director-General's competence for the classification of posts: Regulation 2.1 of the Interim Staff Regulations in force at the time said "the Director-General shall make appropriate provision for the classification of posts according to the nature of the duties and responsibilities required". It is true that this regulation was later replaced by Regulation 2 of the new Staff Regulations which revokes the Director-General's authority and states that he "shall prepare and submit to the Executive Council for its consideration and approval, proposals for the classification of posts", but this new regulation came into force only on 2 July 1999. At the time of the decision cited by the complainants, the Interim Staff Regulations applied. In the exercise of his statutory authority the Director-General, to use the terms of the note of 7 August 1998 "decided as of 1 January 1999, to implement all the grade changes recommended" by the consultant, including those affecting the posts held by the complainants. That decision, which was lawful, became final as it was not contested by the persons concerned, and it was sufficiently specific to confer on them rights which could not be challenged by a later decision to postpone implementation of the reclassification pending a further review.

7. One might legitimately wonder about the consequences of the reclassification since, as the Organisation rightly says, the decision of 7 August draws a distinction between reclassifying posts and promoting eligible incumbents: paragraph 4.5 of the note states that the "incumbent of each post that has been classified at a higher level than its current grade will be promoted to the higher grade, provided that his/her current performance with respect to the functions and responsibilities of the post is satisfactory and provided that the incumbent meets the qualification requirements for the higher grade". But the complainants point out that they draw a distinction between the right to reclassification of their post, which must be automatic, and their promotion, which they concede is not part of the present case. The Tribunal notes that they expressly limit their claims and it is bound to conclude that the decision of 7 August 1998 had the effect of reclassifying their posts as from 1 January 1999, there being no subsequent decision which can legally rescind the post classification.

8. Since their complaints succeed, the complainants are entitled to costs, which the Tribunal sets at 20,000 French

francs.

9. Since the complaints succeed, so too must the applications to intervene insofar as the interveners are in the same position in law and in fact as the complainants.

DECISION

For the above reasons,

1. The decisions of the Director-General of the OPCW rejecting the requests filed on 2 and 10 February 1999 by the complainants are set aside.
2. The OPCW shall pay the complainants an overall amount of 20,000 French francs in costs.
3. The applications to intervene are allowed if the interveners are in the same position in law and in fact as the complainants.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

1. Regulation 2.1 at the material time read as follows: "In conformity with principles laid down by the Organisation, and in accordance with the master standards of job classification as developed by the International Civil Service Commission, and with due regard for the need for economy and efficiency, the Director-General shall make appropriate provision for the classification of posts according to the nature of the duties and responsibilities required."