

NINETY-FOURTH SESSION

Judgment No. 2199

The Administrative Tribunal,

Considering the complaint filed by Miss S. E. T. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 1 November 2001 and corrected on 6 December 2001, the OPCW's reply of 14 February 2002, the complainant's rejoinder of 21 March, and the Organisation's surrejoinder of 17 April 2002;

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, an American citizen born in 1944, joined the Provisional Technical Secretariat of the Preparatory Commission for the OPCW on 23 September 1993 in the External Relations Division on a fixed-term contract as a Senior Secretary at grade GS-5. When the Preparatory Commission ceased to exist, she was given a fixed-term contract with the OPCW. She informed the Organisation in a letter of 29 October 2001 of her intention to resign; this took effect 4 January 2002.

On 28 February 2000 vacancy notice INS/IMB/MAC/P-3/2-00 was published for the post of Management Activities Officer, at grade P-3, in the Inspectorate Management Branch. It specified that the appointment of the selected candidate was to start in September 2000. The complainant applied and was interviewed on 6 September. By a letter of 26 October 2000 the Head of Recruitment Section informed her that another candidate had been chosen for the post. The successful candidate took up the duties of the post on 3 January 2001.

On 22 December 2000 the complainant requested an administrative review of the appointment decision taken by the Director-General and of the selection process. The latter replied on 17 January 2001 that he found no basis to alter his decision.

Having already notified the OPCW on 7 November 2000 of her intention to appeal against the selection decision, the complainant wrote to the Head of the Human Resources Branch on 19 February 2001 requesting various documents to be used in preparation of her appeal; on 1 March he sent her a copy of the Selection Summary Report in which the Interview Panel had made its recommendation to the Director-General. The complainant was listed as the Panel's first choice and the selected candidate had been ranked third.

The Appeals Council rendered its opinion on 20 July 2001; it recommended maintaining the appointment of the selected candidate. The Director-General endorsed this recommendation on 27 July and the complainant was so informed on 7 August 2001. That is the impugned decision.

B. The complainant submits that the selection was flawed. The Interview Panel, composed of the Director of the Inspectorate Division, the Head of the Inspectorate Management Branch, the Director-General's Chief of Cabinet, and the Head of Recruitment, had chosen her as the first-ranked candidate. The choice was endorsed by the Director of the Division. She points out that the Panel members were well qualified to evaluate the best candidate.

She argues that several statutory provisions were breached. The selected candidate's appointment constitutes a breach of Article VIII, part D, paragraph 44 of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (hereinafter the "Chemical Weapons Convention") and Staff Regulation 4.2, both of which require that the highest standards of efficiency, professional competence, and integrity should be ensured when appointing a candidate to a post. Staff Regulation 4.3 has also been breached, as the selection was not made in a transparent manner. She states that, despite having asked senior

staff members on several occasions why she was not appointed, she was not given a clear reason. Furthermore, she was a more senior staff member than the selected candidate: at the material time she had already worked in either the Preparatory Commission or the OPCW for seven years, whereas the selected candidate was external and had worked only for the Preparatory Commission and for a shorter period of time. The complainant points out that she had understood that there was urgency in filling the post and that, contrary to the selected candidate, she had been immediately available to start work right after the incumbent departed officially. She alleges that the candidates most favoured by the Director-General are selected, in particular when they are from his own geographic region, as is the selected candidate; she adds that she has been the victim of this practice a number of times.

It was not until she received the Organisation's reply to her appeal that she learned of the criteria used in the selection process and the alleged reason why she was not appointed. The criteria applied were that of geographic distribution, keeping the staff to a minimum, and seniority by grade. She submits that none of the criteria justifies the appointment of the other candidate. She cites the Tribunal's case law to support her position that the Director-General erred when he gave preference - on the grounds of geographical distribution - to the candidate ranked third by the Interview Panel. She contends that the decision was motivated by personal prejudice against her.

She asks the Tribunal to quash the decision not to appoint her to the post. She does not claim "reinstatement" but rather financial compensation equal to the difference between the salary, allowances and other benefits she would have received if she had been appointed to the P-3 post and the salary, allowances and other benefits she would have received for her GS-5 post, and for a period of nine years from 18 October 2000, plus an allowance for inflation and compound interest. She also claims moral damages and costs. As an alternative to her claims for compensation and moral damages, she asks for a lump sum of 200,000 United States dollars.

C. In its reply the Organisation describes in detail the selection process at the OPCW. It states that the impugned decision was taken within the limits of the Director-General's discretionary authority. Furthermore, it did not breach the complainant's terms of appointment or the selection procedures as set out under the relevant Staff Regulations and Interim Staff Rules.

As far as practicable, all vacancies are advertised and filled on a competitive basis. Although "full regard" is paid to the "suitability and experience" of staff members, this is done without prejudice to the recruitment of "fresh talent". The complainant was one of four qualified candidates recommended to the Director-General by the Interview Panel. Upon receiving the recommendations of the Panel, and in accordance with the statutory provisions in force at the OPCW, the Director-General selected one of the other qualified candidates. It denies that it breached any statutory provisions, but in any event such a breach would not constitute grounds for review by the Tribunal. Staff Regulation 4.1(a) places the power of appointment with the Director-General. The Interview Panel advises the Director-General on recruitment of staff, but it plays no role in the final selection or appointment function. Taking into account the statutory provisions on appointments, the OPCW argues that the Director-General is free to choose another candidate if he sees fit; to interpret the rules otherwise "would reduce [them] to an absurdity".

It suggests that the complainant has misinterpreted the Selection Summary Report; just because she was ranked as the first choice candidate on that one piece of paper does not mean that she was better qualified than the other candidates. In appointing a candidate the Director-General must look at other factors, such as geographical distribution. The selected candidate was the first staff member appointed from her country of citizenship. The OPCW is a "non-career" organisation, therefore seniority plays no role in appointment decisions. The complainant has adduced no evidence to support her allegations that the Organisation's rules have been breached.

She has failed to prove that the decision was motivated by personal prejudice against her, nor has she proven that the Director-General made his decision based on regional favouritism.

As for her argument that she was not given the reason why she was not selected, the Organisation asserts that such an issue should have been addressed in a letter to the person responsible for the impugned decision, in the present case the Director-General. The complainant did not avail herself of this before it was brought up in her internal appeal.

D. The complainant enlarges on her pleas in her rejoinder. Pursuant to an Administrative Directive on recruitment procedures, the Interview Panel is to make its recommendation based on "full regard" for the suitability and experience of staff members already employed by the OPCW and on "due regard" for geographical considerations. She points out that the Organisation has never even argued that the selected candidate was better qualified than she.

Her status as an internal candidate should, therefore, have been taken into consideration. As it was not, this is a clear violation of the rules.

She contends that she did attempt to find out the reasons why she was not selected from the Director-General's Chief of Cabinet and from the Deputy Director-General, as well as from her own supervisor. She alleges that one of those officials told her the decision was taken out of personal prejudice. She provides examples of what she considers to be personal prejudice against her.

E. In its surrejoinder the OPCW presses its pleas and denies the complainant's accusations. It asserts that she has not accurately reflected the texts of the Administrative Directive and the Interim Staff Rules. Furthermore, Administrative Directives are subsidiary to the Staff Regulations and Interim Staff Rules. It points out that the complainant has not cited any rule requiring the Organisation to provide her with the reasons why she was not selected.

CONSIDERATIONS

1. The complainant seeks the quashing of the Director-General's decision appointing an external candidate who only ranked third on the Interview Panel's list to the post of Management Activities Officer, bypassing the complainant who was the first choice. She asks, principally, for financial compensation - instead of reinstatement - and moral damages.

2. The defendant refutes the complainant's allegations and contends that even if these were true, they do not, in themselves, constitute grounds for review by the Tribunal, particularly when read in the context of the Organisation's internal statutes.

Applicable rules

3. The main statutory provisions cited by the parties in support of their respective positions are:

Article VIII, part D, paragraph 44 of the Chemical Weapons Convention:

"The Director-General shall be responsible to the Conference and the Executive Council for the appointment of the staff and the organization and functioning of the Technical Secretariat. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. [...] Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible. Recruitment shall be guided by the principle that the staff shall be kept to a minimum necessary for the proper discharge of the responsibilities of the Technical Secretariat."

Staff Regulation 4.1(a):

"The power of appointment of staff rests with the Director-General. [...]"

Regulation 4.2:

"The paramount consideration in the appointment, transfer and promotion of staff shall be the necessity of securing the highest standards of efficiency, professional competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible. Recruitment shall be guided by the principle that the staff shall be kept to a minimum necessary for the proper discharge of the responsibilities of the Secretariat."

Regulation 4.3:

"Selection of staff shall be made without distinction as to race, gender or religion. So far as practicable, selection shall be made on a competitive basis. Selection and appointment of candidates shall also be done in a manner that ensures transparency of the process and consistency with the principles contained in Staff Regulation 4.2 [...]"

Regulation 4.4(a):

"The OPCW is a non-career organisation. This means that no permanent contracts shall be granted. Staff members shall be granted one of the following types of temporary appointments: short-term or fixed-term. [...]"

Paragraph 6 of Administrative Directive on recruitment procedures:

"Without prejudice to the recruitment of fresh talent at all grades, in filling vacancies full regard shall be paid to the suitability and experience of staff members already in the service of the Organisation who have applied for the vacancy. [...]"

Paragraph 22 of the Administrative Directive:

"Each Interview Panel, established in terms of this administrative directive will advise the Director-General on the recruitment of staff members."

4. The complainant considers her non-selection to the post in question to be a breach of Article VIII, part D, paragraph 44 of the Chemical Weapons Convention, Staff Regulations 4.2 and 4.3, and other relevant rules. She argues in substance that the impugned decision was flawed.

5. In reply to the complainant's pleas the Organisation says that it complied with the five stages in the competitive recruitment of posts, namely: the advertising of the vacancy; the transmittal of all applications to an interview panel for purposes of compiling a short list of those applicants who, on the basis of their applications appear to be the most suitable; the interview of the short-listed candidates by the panel whose duty it is to advise the Director-General of the suitable candidates by order of preference; the exercise by the Director-General of his discretion in deciding which of the candidates would be most suitable to perform the functions of the job, paying due regard to the importance of recruiting the staff on as wide a geographical basis as possible and the overall interests of the Organisation without distinction as to race, gender or religion; and lastly, a provisional offer to the successful candidate followed by a reference check and another confirmatory offer. Only when the successful candidate has accepted the offer will a letter be sent to the other candidates advising them that their applications have been unsuccessful.

6. In the context of the applicable law and rules, the Tribunal sees nothing illegal in the impugned decision. The recruitment and appointment process has been complied with by the defendant organisation.

7. Expanding on certain points raised by the complainant, the defendant points out that the role of the Interview Panel is merely to recommend "appointable" candidates to the Director-General. It merely suggests to him that the first choice on its list, in this case the complainant, scored better overall in the interview than the other candidates but it makes no recommendation to appoint her to the post. To do so would be to exceed its limited authority and turn it into the *de facto* appointing authority, thus removing from the Director-General authority to exercise his discretionary appointive powers granted to him by the Chemical Weapons Convention and the Staff Regulations and Interim Staff Rules.

Part of such discretionary powers consists of paying due regard to recruiting staff on as wide a geographical basis as possible. In this case, there were already 23 Professional staff members (6.8 per cent of total Professional staff) of the complainant's nationality and none of the nationality of the person actually appointed to the post. Since the number of staff is restricted to the minimum, the Director-General has to give serious consideration to appointing candidates from under-represented Member States and regions that the Panel has found to meet all the job requirements and at the same time will satisfy the requirement of the highest standards of efficiency, professional competence and integrity.

8. The vast discretionary power of appointment of the Director-General cannot be fettered by the choice of an interview panel whose function is merely advisory. He cannot, for instance, be bound by the panel's ranking of candidates although it goes without saying that he must exercise his discretion lawfully (see Judgment 1355). There is nothing in the evidence to suggest that the Director-General did not exercise that power legally.

9. As regards the issue of seniority, the Organisation stresses that the States Parties decided to make the OPCW a non-career organisation; hence it does not maintain seniority lists. Instead of a promotion system based on seniority, paragraph 6 of the Administrative Directive on recruitment procedures allows for internal competition for

vacant posts. It considers that the complainant's criterion for measuring seniority is inflexible and self-serving; more particularly, it is merely based on the number of years an internal candidate has served in the Organisation without regard to his/her responsibilities and functions.

10. The Tribunal is of the view that the cases cited by the complainant regarding the seniority principle have no application to her case because, unlike other international organisations, the OPCW has deliberately been set up as a non-career organisation.

11. Bearing in mind the statutory provisions, the Director-General had to choose the candidate who had the greatest possibility of meeting the requirements of the highest standards of efficiency, professional competence and integrity.

12. The complainant argues that she was entitled to be given the reasons why she was not appointed, in line with ensuring transparency of the selection and appointment process.

13. The complainant avers that she had asked senior staff members why she had not been appointed to the post. But she should have addressed her inquiry to the Director-General, who alone could answer her, and not to other persons not responsible for the impugned decision. No such request was ever made, other than in the context of her internal appeal.

14. Precedent has it that "there is no rule or principle of law that requires the Director-General to state in so many words just why he has turned someone down for promotion or appointment" (see Judgment 1355, under 8). The plea fails.

15. The complainant further alleges that the impugned decision was motivated by personal prejudice against her or personal preference for the appointed candidate or favouritism on the part of the Director-General. However, she has not proved these allegations.

16. Lastly, the defendant submits that the complainant has not demonstrated that a right or entitlement of hers has been lost or otherwise negatively affected by the Director-General's decision not to appoint her to the post in question. The Tribunal agrees that she has failed to establish a cause of action. The plea fails.

17. The Tribunal will not set aside the discretionary decision of an appointing authority unless it finds that it was taken *ultra vires*, it shows some formal or procedural flaw, there was misuse of authority, there was a mistake of fact or of law, essential facts were overlooked, or a clearly mistaken conclusion was drawn from the evidence. The complainant has not demonstrated that the impugned decision suffers from any of these flaws.

18. It follows that the complainant's claim for the quashing of the decision she challenges cannot succeed. Nor, therefore, can her claim for compensation for the injury caused by the flaws she alleges.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

Michel Gentot

James K. Hugessen

Florida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 13 February 2003.