NINETY-EIGHTH SESSION

Judgment No. 2407

The Administrative Tribunal,

Considering the complaint filed by Mr A.G S. (hereinafter "the lead complainant") against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 19 September 2003 and corrected on 12 December 2003, the OPCW's reply of 22 March 2004, the complainant's rejoinder of 23 June, and the Organisation's surrejoinder of 27 August 2004;

Considering the complaint filed by Mr S. Bh. against the OPCW on 6 November 2003 and corrected on 8 January 2004, the OPCW's reply of 5 April, the complainant's rejoinder of 23 June, and the Organisation's surrejoinder of 27 August 2004;

Considering the complaint filed by Mr S. Br. against the OPCW on 4 December 2003 and corrected on 15 December 2003, the OPCW's reply of 7 April 2004, the complainant's rejoinder of 18 June, and the Organisation's surrejoinder of 27 August 2004;

Considering the complaint filed by Mrs M. d. C. C. I. against the OPCW on 6 November 2003 and corrected on 12 December 2003, the OPCW's reply of 22 March 2004, the complainant's rejoinder of 23 June, and the Organisation's surrejoinder of 27 August 2004;

Considering the complaint filed by Mrs K. E. against the OPCW on 12 December 2003, the OPCW's reply of 22 March 2004, the complainant's rejoinder of 23 June, and the Organisation's surrejoinder of 27 August 2004;

Considering the complaint filed by Mr I.S. S. against the OPCW on 6 November 2003 and corrected on 8 January 2004, the OPCW's reply of 6 April, the complainant's rejoinder of 23 June, and the Organisation's surrejoinder of 27 August 2004;

Considering the applications to intervene in Mr Bh.'s case, filed by Mr M. K. and Mr H.S. R. on 24 and 25 June 2004 respectively, and the Organisation's letter of 28 October 2004 to the Registrar of the Tribunal, notifying its comments on those applications;

Considering the applications to intervene in Mr S.'s case, filed by Mr J.A. O. and Mr B.R. N. on 23 and 24 June 2004 respectively, and the Organisation's letter of 28 October 2004 to the Registrar of the Tribunal, notifying its comments on those applications;

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

Having examined the written submissions;

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

A. The complainants were employed in the Technical Secretariat of the OPCW, initially under three-year fixed-term appointments. Three of them joined the Organisation in 1997 and three in 1998. All but one worked as Inspectors in the Inspectorate Division – two being later assigned to the Verification Division. They had all received contract extensions of up to three years. Their fixed-term contracts were due to expire at varying dates in June 2003, and in the case of Mr Br. – on 7 December 2003.

Staff Regulation 4.4 specifies that the OPCW is a non-career organisation and that, with certain exceptions, the total length of service of Technical Secretariat staff shall be seven years. By decision EC-M-22/DEC.1, dated 28 March 2003, the Executive Council – acting at the request of the Conference of the States Parties – decided that the effective starting date for the seven-year total length of service would be the date of adoption of the Organisation's Staff Regulations, which was 2 July 1999. It also recommended to the Conference of the States Parties that the average rate of turnover in respect of Secretariat staff subject to tenure, beginning with the year 2003, should be one-seventh per year. On 30 April 2003 the Conference adopted decision C-SS-2/DEC.1, deciding, inter alia, that

the average rate of staff turnover would be one-seventh per year.

On 9 May 2003 the OPCW issued Administrative Directive AD/PER/28, which set out the procedure for extension or renewal of fixed-term contracts. That directive cancelled and superseded Administrative Directive AD/ADM/16/Rev.2 of 2 May 2002.

By an Information Circular of 16 May 2003 staff were informed that – due to the requirement to give them three months' notice – certain staff whose contracts were not being renewed in June, July or August 2003 would be offered a special extension.

By letters, which for most complainants were dated 16 May 2003 – and in Mr Br.'s case was dated 23 June – the Acting Head of the Human Resources Branch informed each complainant that, pursuant to decisions EC-M-22/DEC.1 of the Executive Council and C-SS-2/DEC.1 of the Conference of the States Parties and in particular pursuant "to the reference made regarding the annual turnover required to commence in 2003", the Director-General would not be able to offer them an extension of their fixed-term contracts when they expired in June, or for Mr Br. – on 7 December.He went on to say that the Director-General, in accordance with paragraph 7(b) of Administrative Directive AD/PER/28, was nonetheless prepared to offer them a "special extension of up to six months", between his present notification and their "actual separation". They were each asked to confirm their wishes in writing within ten days: failing that, their separation would occur on the expiry date of their fixed-term contract.

The complainants all sought a review of that administrative decision, with some requesting a one-year extension. They also, in most cases by a handwritten note on a copy of the letter referred to above, indicated that they wished to accept the offer of the six-month extension, while reserving their right to contest the Director-General's decision not to extend their existing contracts.

By letters of various dates between 23 June and 21 August – which constitute the impugned decisions – the Acting Head of Human Resources replied to their requests for review, on the Director-General's behalf, confirming the decisions not to extend their fixed-term contracts. In the same letters he informed the complainants that, as they had decided to take advantage of the special final extension, their service would come to an end on 15 November 2003 upon the expiry of the special extension.

For Mr Br., the special extension was to end on 22 December 2003. He was in the Verification Division and, on 26 June, asked his Division Director for a copy of the recommendation made to the Human Resources Branch in connection with the extension of his contract. He received a copy the same day. It showed that the Director had not recommended the extension of the complainant's contract and referred to a "branch internal ranking". The complainant requested further clarification, wishing to know what criteria were used in making the recommendation. He received no response.

On 21 August 2003 the Director-General issued Information Circular OPCW-S/IC/74, which informed staff that if certain conditions were met he would agree to a staff member's request for waiver of the jurisdiction of the Appeals Council, so that they could appeal directly to the Tribunal. The complaints have thus been filed directly with the Tribunal.

B. The majority of the complainants, who were defended by the same counsel, submit that the decision they each impugn was unlawful on the following grounds.

Firstly, it was flawed by a misuse of procedure amounting to abuse of authority. They question the purpose of Administrative Directive AD/PER/28, of May 2003, pointing out that the Contract Extension Board was abolished by that directive but had already made a favourable recommendation with regard to the extension of their contracts. They assume that its recommendations were disregarded. As the non-renewal process was set in motion under Administrative Directive AD/ADM/16/Rev.2 of May 2002, they argue that it should have been followed through under the same directive. If the new directive of May 2003 did apply, it was not correctly adhered to – notably because it specifies that a "properly substantiated" recommendation is to be made by the staff member's division director, and there is no evidence that that happened.

Secondly, they submit that the impugned decision in each case was not based on a good reason. The one given was the new requirement of an annual turnover rate, but that cannot justify the non-renewal of their contracts as it went

against the principle of non-retroactivity. It was a new reason for non-renewal, and for most of them was introduced only two months before the expiry date of their fixed-term contracts, thereby fundamentally changing their situation. The reason for non-renewal did not comply with the principle of good faith, for one thing because it showed that the implementation of the seven-year maximum length of service was being used to justify a new limitation to five years or less. Nor did it comply with the Organisation's obligation to substantiate a decision. It was never explained why they in particular were chosen for non-renewal of contract, and what criteria were used.

Thirdly, the impugned decision was taken in disregard of the Organisation's obligation not to cause staff members unnecessary hardship. Some of the complainants argue that, considering their very good performance record, they were legitimately entitled to expect to be employed by the Organisation for seven years – i.e. until June 2006 or beyond. The non-renewal decision thus came as a surprise and caused them material and moral injury. One complainant argues that because of the timing of the non-renewal decision there was a risk that his children's education would be severely disrupted. Another states that as the non-renewal decision came during her maternity leave it caused her distress.

The pleas put forward by Mr Br. overlap in many respects with those mentioned above. He alleges errors of procedure, claiming that the procedure for considering the renewal of his contract was changed part-way through, by the issuance of the new Administrative Directive in May 2003. Additionally, he was not given the opportunity to make his observations on the non-renewal of his contract, and contends that that was contrary to his rights of defence.

The complainants ask the Tribunal to set aside the impugned decisions. All but one seek an order that the Organisation will either reinstate them from mid-November 2003 – and pay them all salary and benefits to which they would be entitled – or alternatively pay them two years' gross salary, including allowances, benefits and the Organisation's contribution to the Provident Fund, and reflecting annual step increases. Each complainant seeks an award of moral damages. Mr Br. also claims material damages. They each claim costs.

C. In its replies the Organisation contends that all the complaints are irreceivable. To the extent that the complainants are challenging confirmation of a decision not to renew their fixed-term contracts in mid-2003 – or in Mr Br.'s case from 7 December 2003 – their complaints lack substance and purpose and are irreceivable *ratione materiae*.They were not separated at that time and the non-renewal decisions therefore ceased to have any legal effect. In fact, the decisions notifying them of the non-renewal were superseded by the letters containing the reply to their request for review. Those letters contained two decisions. They confirmed the one not to renew their fixed-term contracts and conveyed to them the separate new decision to grant them a final extension of contract until 15 November 2003 – or in Mr Br.'s case, up to 22 December 2003. The complainants, however, have never sought a review of that latter decision. Consequently, to the extent that they challenge the decision to extend their appointments only to the end of the special extension, their complaints are irreceivable for failure to exhaust the internal means of redress.

In addition, in its replies on three of the present cases it expresses reservations because the complainants concerned have not submitted their own pleadings and have thus not complied with Article 6 of the Rules of the Tribunal.

Replying on the merits on all six complaints, the OPCW argues that by accepting their last contract extension, the complainants agreed that it was subject to the provisions of the Staff Regulations, including the provision that the extension did not "carry [any] expectation of renewal". Citing the case law it states that the question of renewal of a fixed-term appointment falls within the discretionary authority of the Director-General, and is subject to only a limited power of review by the Tribunal. In this instance, the non-renewal decision was taken in the interest of the Organisation.

It rebuts the allegation of abuse of authority, arguing that the complainants have not shown that the Director-General acted for any unlawful purpose. Both the Administrative Directive of May 2002 and the one issued in May 2003 expressly recognised the authority of the Director-General to take decisions on contract extensions "within his discretion and in the interests of the Organisation". The Director-General took into consideration not only the decisions of the Executive Council and the Conference of the States Parties concerning the tenure policy and the related staff turnover policy, but also elements from the complainants' personnel files.

The Organisation explains that the Director-General was given an opinion on the comparative performance ranking of inspectors whose contracts were to expire in June-July 2003. This was provided to him by the Acting Director of

the Inspectorate Division after consultation with senior colleagues of the Division. The opinion concerned 76 inspectors, and for reasons of confidentiality was not disclosed to the complainants.In the case of Mr Br., his Division Director made a recommendation and he was given a copy. There was no breach of his rights of defence because in a matter of non-renewal he would not be called upon to argue his case. It rebuts his suggestion that there was any "change of procedure" during the non-renewal process.

Furthermore, it cannot be said that the impugned decisions were unsubstantiated. It was made known to the complainants that the non-renewal of contract stemmed from the Director-General's obligation to implement the Organisation's tenure policy. Nor was the reason for non-renewal at odds with the principle of non-retroactivity. The tenure policy did not affect any existing legal right of the complainants. Before the policy was inserted in the Staff Regulations on 2 July 1999, they had the status of a staff member with no contractual right to the renewal of their appointments, and that did not change thereafter.It rebuts the plea that it acted in bad faith.

It holds that there is no legal basis for the complainants' claims for redress, nor is there any basis for their expectation to remain employed by the OPCW until June 2006 or beyond. The Organisation applies for hearings and asks the Tribunal to hear the Director-General as a witness.

D. In their rejoinders some of the complainants submit that they are no longer relying on the plea based on abuse of authority. Noting that the confidential performance ranking made by the Acting Director of the Inspectorate Division was taken into account by the Director-General but was not disclosed to them, they argue that the decision impugned in each case is flawed by breach of due process. Similarly, in the light of Judgments 2315 and 2293 respectively, they no longer press the pleas of non-compliance with the principle of non-retroactivity and the good faith principle.Given that the annual turnover requirement could not legally be invoked by the Director-General as a reason for non-renewal, they argue that the impugned decisions were taintedby an error of law.

E. In its surrejoinders the Organisation states that the opinion submitted to the Director-General was not an individual opinion concerning the complainants; it was a comparative opinion concerning many other inspectors, and the complainants had no automatic right to disclosure of such information. With respect to the new plea of error of law it says that, contrary to what they argue, the staff turnover policy is not a condition of their contracts, and the implementation of that policy did not affect any fundamental condition of their employment.

At the request of the Tribunal, the Organisation has subsequently produced, on a confidential basis, the opinion that was submitted to the Director-General by the Acting Director of the Inspectorate Division.

CONSIDERATIONS

1. The six complainants are former employees of the OPCW whose fixed-term contracts came to an end in 2003. Instead of being renewed for a further year or more, their contracts were extended for a final term of less than six months. Three of them had joined the Organisation in 1997, and three joined in 1998. All but one had been in the Inspectorate Division; two of them were later assigned from that division to the Verification Division. Nothing turns on these differences. The six complaints raise common points of law and the minor factual variations, particularly as regards the specific dates of letters etc., are not such as to be relevant to the outcome. All but one of the complainants are represented by the same counsel. The Tribunal orders that the case brought by Mr S. (hereinafter the "lead complainant") and those brought by the other five complainants be joined to form the subject of a single ruling.

2. The complaints put in issue the Organisation's Staff Regulation 4.4 which (with certain irrelevant exceptions) fixed the maximum tenure of staff members of the OPCW at seven years. Regulation 4.4 was adopted in 1999 and will be referred to hereinafter as the "tenure" rule. In relevant part it reads:

"(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. The initial contract period shall not normally exceed three years. Contract extensions are possible; however, contracts, including extensions, carry no expectation of renewal or re-employment. Contract extension will become progressively more difficult, and shall be assessed upon, inter alia,the staff member's performance measured in accordance with a rigorous performance appraisal system. Any contract extension will be based on a continuing need on the part of the Organisation for the specific skill and knowledge of the staff member.

(b) The total length of service of Secretariat staff shall be seven years unless otherwise specified below [...]"

3. This case also concerns the policy adopted by the Executive Council in March 2003 and confirmed by the Conference of the States Parties a month later by which it was decided that in implementation of the tenure rule the average rate of turnover of staff would be set at one-seventh per year. The policy (referred to hereinafter as the "turnover policy") is clearly intended to guide the Director-General in the exercise of his discretion when deciding when and whether to renew employment contracts as they reach their term.

4. The tenure rule (Regulation 4.4) was adopted prior to the last contract extension granted to each of the complainants in 2000 or 2001. Since the contract created by that extension was stated to be subject to the Organisation's Staff Regulations, the tenure rule formed part of each of their terms and conditions of employment that applied before the extension period (contrary to the situation at issue in Judgment 2315).

5. The turnover policy, on the other hand, was adopted only months before the end of the complainants' fixed-term contracts and they never agreed to it either expressly or by implication.

6. By a letter dated 16 May 2003 the Acting Head of the Human Resources Branch informed the lead complainant that pursuant to the Organisation's newly adopted turnover policy, the Director-General regretted that he was not in a position to offer him an extension of his fixed-term contract when it expired on 30 June 2003. By that same letter he was informed that "the Director-General [was] nonetheless prepared to offer[him] a special extension of up to six months, between [that] notification and [the complainant's] actual separation from the Organisation, and to extend [his] contract accordingly, should [he] so require". On 23 May 2003 by a handwritten annotation on a copy of the above-mentioned letter the lead complainant accepted the proffered extension, whilst reserving his right to contest the "decision that was taken not to extend [his] existing contract by one year". By a letter dated 18 June he requested from the Director-General a reviewof the decision contained in the letter of 16 May 2003.In a letter of 23 June the lead complainant was notified of the decision of the Director-General to confirm the decision of 16 May "not to extend [his] currentfixed term contract beyond its expiry date of June 30 2003". The same letter also went on to confirm the Director-General's decision to grant the lead complainant a special final extension until 15 November 2003. On 22 July 2003 the lead complainant submitted his statement of appeal to the Appeals Council.

7. Later, he was informed that the Director-General had given his agreement to waive the jurisdiction of the Appeals Council to enable the complainant to appeal directly to the Tribunal, and his complaint was thereafter timely filed.

Receivability

8. The Organisation objects to the receivability of all the complaints. In its view the 16 May 2003 letter contained two quite separate decisions, the first being not to renew the lead complainant's contract when it expired on 30 June, and the second to offer him the possibility of a special extension. Furthermore, in the Organisation's view, the lead complainant's request for review and the Organisation's refusal thereof – contained respectively in the letters of 18 and 23 June – dealt only with the first of those decisions. Likewise, argues the Organisation, the 16 May letter did not actually offer a special extension but only indicated a readiness to make such an offer, and it was not until the lead complainant's indication of his readiness to take up such an extension that the new short-term extension was, by a new and separate administrative decision, offered, and accepted. Thus, it is argued, the protest against the non-extension of the lead complainant's contract beyond 30 June 2003, the refusal thereof by the letter of 23 June, and the appeal of the latter decision to the Tribunal are now without object since the contract was in fact extended beyond the end of June. It is said that the lead complainant's real grievance is with the non-extension of the short-term extension which was granted to him and which ended on 15 November 2003, but no administrative decision relating to that extension was ever properly protested or appealed to the Tribunal.

9. The argument is unacceptable. It is quite impossible to sever the decision not to extend the contract beyond 30 June from the correlative decision to offer the complainant a short-term extension. Both were first communicated in the initial decision of 16 May and both were confirmed by the review decision of 23 June. It is also unacceptable to treat the 16 May 2003 letter as indicating merely a willingness on the part of the Director-General to consider granting a short-term extension and not as an actual offer of such an extension which became binding upon the Organisation as soon as it received notice of the complainant's acceptance of it.

10. This view is reinforced by an Information Circular, dated 16 May 2003, which indicated that, since the requirement of three months' notice of non-renewal of contract would not be met in the case of contracts due to expire in June, July and August 2003, those staff members who were not offered a renewal would "be offered a special extension that will ensure a period of 6 months elapses between the date of notification of non-renewal and their separation from the OPCW". The offer of a short-term renewal was therefore a necessary part of the decision not to renew for a longer term and was required to bring the Organisation into line with its own notice requirements.

11. Although the dates of some of the documents vary, their purport and meaning is not changed and the same considerations apply to all the complaints. Accordingly, they are receivable.

The merits

12. In their rejoinders all the complainants (other than Mr Br.) restate and refocus their arguments, primarily in light of two recent holdings by the Tribunal (in Judgments 2293 and 2315). The Tribunal agrees that its decisions in those two judgments make any arguments based upon acquired rights, breach of the rule against retroactivity, bad faith or misconstruction of the terms of the contract and applicable rules and directives of no avail to the complainants.

13. In particular, in Judgment 2315, dealing with a tenure rule and turnover policy which were for practical purposes identical to those in issue here, the Tribunal stated:

"24. As already pointed out, the complainant is employed under a fixed-term contract with no expectation of or right to extension or renewal. Thus, were the seven year policy applicable in determining whether to renew his appointment (which, as already indicated, it is not and will not be until some appropriate term is incorporated in his contract), it would not affect his existing rights, liabilities or status. At most, it would affect the discretion to be exercised by the Executive Secretary on the question of his reappointment. If the policy were applicable, the discretion would be limited to the question whether in his case there was a need to 'retain essential expertise or memory'. On the other hand, if the policy is not applicable, there is a more general discretion to be exercised having regard to the interests of the defendant.

25. A change in the nature of the discretion to be exercised in determining whether to grant future rights by the extension or renewal of a contract cannot be said to effect a change in an existing legal interest, much less in an existing legal right or existing legal status. Accordingly, the seven year policy embodied in Administrative Directive 20 is not retroactive even if the seven year period is computed from a time prior to the proclamation of that policy."

14. Since the arguments as restated in the rejoinders now form the basis upon which it is sought to overturn the impugned decisions, and since the complainant defended by a different counsel raises no new or different points, the Tribunal now turns to those arguments.

15. First, it is said that the decisions are flawed because there was a lack of due process in the steps leading up to the impugned decisions. In particular, it is said that the Director-General sought and received a memorandum from the Acting Director of the Inspectorate Division on the relative performance of all the inspectors, 76 in number, whose fixed-term appointments were coming up for renewal between June and December 2003. Although duly requested, this document was not made available to the complainants either before the date of the impugned decisions or subsequently.

16. The Tribunal has called for and privately inspected the document in question. It contains a summary of the results of a consultation held by the Acting Director of the Inspectorate Division with Team Leaders and the collective assessments made by the latter, based both on the annual evaluations of all the inspectors whose fixed-term contracts were coming to an end and on their personal knowledge and judgement of those inspectors with whom they had worked. It ranks them all in terms of their relative performance in the collective judgement of the Team Leaders. It was properly treated by the Organisation as confidential.

17. Two points are of particular relevance here. First, all the inspectors whose fixed-term appointments were then coming to an end had received high and satisfactory performance ratings; unsatisfactory performance has never been suggested as a reason or justification for the challenged decisions. In fact, the former Contract

Extension Board, with the concurrence of the Acting Director of the Inspectorate Division, prior to the abolition of the Board, appears to have recommended extension of all their contracts for at least another year. Second, there was no formal administrative procedure laid down for establishing who, amongst a group of staff members, all of whom had given satisfaction and none of whom had a legitimate expectation of renewal of their contracts when they fell due, should receive extensions and for what periods of time. The opinion sought and received by the Director-General setting out in tabular form for comparative purposes the evaluation of the relative performances of all of them, was a working tool based on both the judgements of their immediate superiors and on the materials already contained in each of the inspectors' files, the latter of course being known to each of them individually. Since none of them had a right of renewal none of them had the right of access to the others' personnel files for the purposes of attempting to persuade the Director-General that he or she should be selected for renewal in preference to his or her colleagues. In fact, they had no right to be heard on the subject at all. (See Judgment 600.)

18. The comments in the preceding three paragraphs do not apply to the cases of Mr Br. and Mrs E. The former was in the Verification Division rather than the Inspectorate Division. His Division Director recommended that his contract not be renewed because of the turnover policy and he was so notified. The recommendation was used as the relevant opinion by the Director-General in deciding not to renew his contract. There is no merit to his argument that he was somehow prejudiced by the change of procedure: under neither system did he have any right of renewal and he received a copy of the Division Director's opinion. It is not clear what procedure was followed in the case of Mrs E., but she makes no claim that she was denied due process.

19. There can be no failure of due process where there is no process and no substantive right is in issue. The complainants' contracts were all coming to an end with no expectation of renewal. In a very real sense the Director-General was not choosing whom to let go but rather, through the best exercise of his discretion and judgement and assisted by his senior officers, whom to rehire in the best interests of the Organisation. In carrying out that task he was quite entitled to consult his senior staff for advice and to obtain their views as to the relative merits of those who, by definition, were all worthy of having their contracts renewed. The views of the Division Directors and the Team Leaders consulted, necessarily involving personal judgements of relative merits of persons other than the complainant, were properly treated by the Organisation as confidential. Given the requirements of the turnover policy, the Director-General was not bound to seek such advice, or to follow it if received. In fact, it is not absolutely clear that he did follow the advice in every case. It was open to the Director-General to adopt whatever selection procedure he considered best with regard to the interests of the Organisation. Certainly, the procedure adopted in relation to the Inspectorate Division was one that, within the limits imposed by the turnover policy, took account of the Organisation's interests.

20. The second argument advanced in support of the complaint of the lead complainant is that the impugned decision was not properly substantiated. In fact the decision was fully supported by the adoption of the turnover policy for the purpose of implementing the seven-year tenure rule. The turnover policy is not, and could not be, directly attacked and it is a logical, and perhaps even a necessary, consequence of the tenure rule. Once it is accepted that such a policy will inevitably result in the non-renewal of the contracts of staff members who, in the absence of both the rule and the policy, would have been given contract extensions, the only reason for deciding to let some of them go is the turnover policy itself. To put the matter another way, once it is accepted that a certain percentage of staff will have to leave every year, and once normal attrition through retirement, release for lack of work and dismissal for unsatisfactory performance has been taken into account, the early years of the implementation of a fixed turnover policy will inevitably result in the release of some people who would otherwise have received new contracts. If, as is the case here, all the persons in the pool of those whose contracts are coming to an end have exemplary performance records and are in positions which must continue to be filled if the Organisation is to function properly, there is no objective, consistent or strictly rational basis on which the administration can decide who is to stay and who is to go. It is the classic case of the exercise of discretion. As long as there is no evidence of wrongdoing such as personal prejudice, ulterior motive or bad faith, and there is none, the decision-maker must ultimately be allowed to exercise his or her judgement and the Tribunal will not interfere. The substantiation for the decision is, and was stated to be, the turnover policy and nothing more can be required in the way of a reason.

21. In further argument the complainants urge that it was illegal for the Organisation to add a new term or condition to their contracts of employment by bringing in the one-seventh staff turnover policy prior to the expiry of their fixed-term contracts and then using it as a reason for not renewing those contracts for a full year. The argument is misconceived. 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, as it did in the case of all the complainants, its implementation required policy decisions to be made by the Organisation. Given the size and relative newness of the Organisation it was apparent that the tenure rule would create staffing and recruitment difficulties for it if steps were not taken to stagger the rule's effects over a period of time. It is difficult to see how this could have been done differently without effecting a serious breach of the seven-year tenure rule. Whatever implementation policy was adopted, it would have produced problematic results for some staff members as well as for the Organisation itself. Since the policy is not clearly irrational the Tribunal will not interfere with the Organisation's decision in that regard. In effect, since no staff member had any right or legitimate expectation of renewal of his or her contract upon its expiry, none has suffered harm from the implementation of the turnover policy.

22. As a final argument some, but not all, of the complainants say that the Organisation had a duty not to cause unnecessary harm to members of its staff. The unexpected non-renewal of their contracts with only six months' notice caused disruption to their personal lives and particularly to their educational plans for their children. But as has been shown, the seven-year tenure rule was made one of the terms of their individual contracts of employment and cannot therefore be the source of complaint on their part. As for the turnover policy, the Tribunal has already ruled that it was a rational consequence of the rule and if some staff members suffered harm, due to not receiving extensions to which their contracts gave them no right, that harm flows not from the actions of the Organisation, but from the contracts freely and voluntarily entered into by the members of its staff. The tenure rule which they must be deemed to have accepted and the turnover policy which flowed from it made long-term planning on their parts necessarily precarious but that cannot be the proper foundation for a claim.

23. Some complainants urge grounds peculiar to themselves. Thus, one suggests that the decision not to renew was in her case due to the fact that she was on maternity leave and could not be informed of the change in policy; another suggests that he was chosen for non-renewal because he was a member of the Staff Council. There is no evidence whatever to support any argument that these alleged extraneous factors had any influence on the impugned decisions and they must be rejected.

24. For its part, the Organisation seeks the holding of a hearing. No good reason for such a request has been advanced, and the Tribunal rejects it.

25. The complainants all reached the end of their fixed-term appointments and were given special extensions to work out the minimum notice period of non-renewal which the Organisation had imposed upon itself. When those short-term extensions expired they had no right and no expectation of any further employment. Their contracts had been made, and accepted by them as being, subject to the seven-year tenure rule. That rule logically led to the adoption by the OPCW of the one-seventh turnover policy which was the reason for the decisions not to offer them further contracts. They have no cause for complaint.

26. The Tribunal has received applications to intervene from four former fixed-term staff members whose contracts were not renewed in conditions similar to those of the present complainants. In all four cases the proposed interveners protested the administrative decisions not to offer them new contracts and in due course sought and received the Organisation's agreement to waive proceedings before the Appeals Council and allow them to go directly to the Tribunal. None of them filed a timely complaint and their applications to intervene were only made in June 2004, months after any recourse to the Tribunal would have been long out of time. Since none of them is in the same situation of law and fact as any of the complainants, the applications must be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 11 November 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.