116th Session **Judgment No. 3284**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. M. R. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 5 August 2011 and corrected on 12 October 2011, the OPCW's reply dated 23 January 2012, the complainant's rejoinder of 30 April and the OPCW's surrejoinder dated 3 August 2012;

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

Having examined the written submissions and having decided not to hold an oral proceeding;

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

A. The complainant joined the OPCW in February 2003 as a Media and Public Affairs Clerk in the Media and Public Affairs Branch (MPB) of the External Relations Division (ERD). With effect from 1 October 2005 he was appointed to the post of Media Designer at grade GS-5 in MPB.

In September 2008 the Division of Administration initiated a review of the job descriptions of all posts in MPB in order to

determine staffing needs. As a result, a modified job description for the complainant's post was drafted in December 2008. It referred to his additional duties, in particular to the management of the content of the OPCW website and publications through the administration of a web content management system. An external classifier was appointed to review the modified job description and he concluded, on 23 March 2009, that the complainant's post should be reclassified to grade P-2 and that he should be given the title "Web Content Manager". On 30 March the Head of MPB wrote to the Head of the Human Resources Branch (HRB) requesting that the post then occupied by the complainant be reclassified to the P-2 level. In turn the Acting Head of HRB wrote to the Director-General on the same day asking him to consider the reclassification of the complainant's post. An exchange of communications then ensued within the Administration concerning inter alia the consequences of upgrading a G-level post to a P-level. On 17 August 2009 the Budget Committee met to consider the budgetary implications of the proposed reclassification and concluded that the ERD budget for 2010 could absorb the cost of reclassifying the complainant's post to grade P-2. It noted that, if the Executive Council approved the reclassification at its forthcoming 58th Session in October, there would be no budgetary implications for 2009 because the recruitment process would take some time and would preclude the post being filled in 2009. The Budget Committee's conclusions were forwarded to the Director-General on 19 August.

On 17 September the complainant was informed that the Director-General had decided that the reclassification of his post would be pursued with the preparation of the 2011 OPCW Programme and Budget. On 22 September he wrote to the Head of HRB requesting, as an interim measure pending the approval of the reclassification of his post, an increase in steps within his current grade to match a P-2, step 1, salary with effect from 1 October 2009. The Head of HRB notified him on 21 October that the Director-General had decided to reject his request for a within-grade increase in steps on the ground that interim Staff Rules 3.1.02 and 3.1.03 did not allow salary increments for incumbents awaiting a decision from the Executive Council. He added that should the request for reclassification be

approved, he would have to undertake a competitive recruitment procedure for the P-2 post because promotion to a post reclassified more than one level upwards was not automatic. On 3 November the complainant requested the Director-General to review both his decision to delay the submission of the reclassification request to the preparation of the 2011 OPCW Programme and Budget and his decision not to grant him an increase in steps. He was informed on 30 November that his request for review was rejected.

The complainant filed an appeal on 23 December 2009 with the Appeals Council alleging that he was prejudiced by the Director-General's decision not to submit the request for reclassification to the Executive Council at its 58th Session. He asked the Director-General to submit the reclassification request to the next session of the Executive Council, i.e. its 59th Session to be held in February 2010, and to promote him with effect from 1 January 2010 once the reclassification request had been approved. In the event that the Executive Council did not approve the reclassification, he asked to be "financially compensate[d] [...] to match the P-2 salary". He also claimed material and moral damages in an amount equivalent to the difference in salary that he would have earned at the P-2 level from 1 January 2007, the date of potential effect or implementation of the action taken by him in early April 2006, until the date the post was reclassified and he was promoted to it, or the date on which he was granted financial compensation, in the event the Executive Council rejected the request for reclassification. The complainant was informed on 27 July that the Appeals Council had been unable to meet to finalise its report due to its members either taking holidays or having busy work schedules. However, it was expecting to resume its work in mid-August.

On 23 September 2010 the Director-General submitted a request for the reclassification of the complainant's post to the Executive Council along with the proposal related to the 2011 OPCW Programme and Budget. The Executive Council approved the request on 8 October 2010 and the post was advertised on 6 December 2010. In the meantime, on 22 October the complainant submitted his

resignation effective 21 November 2010 stating that he had accepted a job offer in another international organisation.

In its report of 3 May 2011 the Appeals Council found that the complainant had performed, "for an extended duration of time", duties which were outside the scope of his job description and beyond his grade. It therefore recommended that appropriate compensation be granted to him. The Council also considered that it was not competent to consider the claim regarding the award of financial compensation in the event that the complainant's post was not reclassified and that he continued to work at the GS-5 level.

By a letter of 23 May 2011, the complainant was informed that the Director-General had considered that he was not legally entitled to the relief he sought on the ground that he had not continuously worked at a level above the level of his post. However, given the fact that the Appeals Council had recommended that he be compensated for the extra work he had performed, the Director-General decided, without prejudice to the position that the OPCW had acted in line with applicable rules, to accept that recommendation and to offer him an *ex gratia* payment of 3,000 euros as a final settlement of his appeal. That is the impugned decision.

On 27 May 2011 the complainant wrote to the Head of HRB stating that the amount offered by the Director-General did not constitute "appropriate compensation" given that he had been performing duties of a higher level for nearly four years. He therefore requested that the Director-General reconsider his decision. The Head of HRB notified him on 22 June 2011 that his request was rejected.

B. The complainant alleges undue delay in the internal appeal proceedings, pointing out that nearly 17 months elapsed between the date of filing of his internal appeal and the date on which the Appeals Council issued its report. In his view, the fact that some members of the Council were unavailable is not a valid ground for inordinately delaying the internal appeal proceedings. The complainant criticises the OPCW for having failed to ensure the proper functioning of the internal appeal system.

He also contends that internal appeal proceedings were flawed on two grounds. First, they were tainted by breach of confidentiality insofar as some of the meeting transcripts that he submitted to the Appeals Council were disclosed to his supervisor, a third party to the proceedings, who verbally berated him in front of colleagues regarding the alleged use of these transcripts. He informed the Council of the breach of confidentiality but the latter failed to address that argument in its report. He adds that he filed an internal complaint of harassment on that ground. Second, the Appeals Council failed to fully examine all relevant facts before making its recommendation to the Director-General, in particular facts which demonstrate that he worked at a higher grade than that of his post. Indeed, no reference is made in its report to the fact that he had been a "Project Manager" since 2008, that he had performed some P-3 level duties or that he had been designated as alternate Head of Programme for MPB and Receiving Officer for ERD in 2009. He adds that the Appeals Council wrongly concluded that it was incompetent to consider his claims for financial compensation in the event that his post was not reclassified.

The complainant contends that the Director-General should have submitted the reclassification request to the Executive Council at its 58th Session in October 2009 and he criticises the OPCW for having failed to reclassify his post within a reasonable period of time. He indicates that his reclassification request dates back to April 2006, and that, since January 2007, he had been performing duties which were not set out in his job description. In his view, there were no valid reasons for such delay, in particular given that all the necessary documents were ready, that there were no budgetary restrictions, and that all the officials concerned had agreed that his reclassification request was justified.

According to the complainant, the OPCW showed a lack of good faith in the way it handled his reclassification request. Indeed, he was led to believe that the proposal for reclassification would be submitted to the Executive Council at its 58th Session. He indicates, for instance, that the Head of MPB, the Head of HRB and the Director of Administration promised him during a meeting held in July 2009 that

his post would be reclassified at grade P-2 and that he would be promoted without having to participate in a competitive selection process.

Referring to the Tribunal's case law, he contends that the decision not to compensate him for discharging duties and responsibilities which exceeded those of his GS-5 post for nearly four years was a violation of the principle of equal pay for equal work. He points out that his duties were not of a temporary nature and he did not volunteer to perform them but was asked to do so. He alleges that the OPCW's failure to remunerate him according to the principle of equal pay for equal work amounts to an "unjust enrichment" of the Organisation. He points out that Interim Staff Rule 3.1.04 provides that a staff member may in exceptional cases be granted a special post allowance, but that he was not granted one.

The complainant asks the OPCW to disclose with its reply all documents that relate to the reclassification of his former post, to the decision to defer the matter to the preparation of the 2011 Programme and Budget, and to the duties he discharged between January 2007 and the date of his separation from service. In addition, he requests disclosure of all documents relating to the rationale behind the decision not to approve a within-grade increase in steps to match a P-2, step 1, salary or not to grant him an *ex gratia* payment to compensate him for the discharge of P-2 level duties. In the event the OPCW fails to produce the said documents, he requests that the Tribunal award him a default judgment. He also requests an oral hearing.

In addition the complainant asks the Tribunal to set aside the impugned decision. He seeks material damages in an amount equivalent to the difference in salary, emoluments and other benefits, including pension benefits, which he would have received had he held grade P-2 from 1 January 2007 to the date he separated from service. He seeks 100,000 Swiss francs in moral damages and 25,000 francs for undue delay in the internal appeal proceedings. He claims interest on all amounts awarded by the Tribunal for the period from 1 January 2007 to the date of full execution of the Tribunal's judgment. He further seeks costs.

C. The OPCW submits that the complainant's claim for 100,000 francs in moral damages is new; it should therefore be considered as irreceivable for failure to exhaust internal remedies.

On the merits, it asserts that the minimal delay in the internal appeals proceedings did not prejudice the complainant, and it emphasises that he resigned to take up a position in another organisation. Hence, any delay in his case had no negative impact on his career prospects. Regarding the alleged breach of confidentiality, it observes that the complainant filed an internal harassment complaint against his supervisor related to that matter, but he withdrew it very soon after. Consequently, no investigation was conducted on the alleged harassment and the alleged inappropriate disclosure of information. Furthermore, the complainant himself appended documents to his complaint which were not addressed or copied to him, thereby breaching his duty of confidentiality.

The OPCW argues that no reclassification action was formally initiated by the complainant or his supervisor in April 2006. It was only in late 2008 or early 2009 that steps were taken in that respect following the decision by the Division of Administration to conduct an overall review of all existing posts in MPB. Once the review had been conducted the complainant's job description was modified in December 2008 and reviewed by an external classifier, who concluded that the complainant's post should be reclassified at the P-2 level. The initial request for reclassification was then forwarded to the Director-General for his consideration on 30 March 2009. The defendant contests the complainant's contention that his duties had substantially changed in 2006 and it asserts that the reclassification was not prompted by a change in his duties but rather because the functions of his post, together with other posts within MPB were being modified and reviewed in light of the Organisation's staffing needs.

According to the OPCW, the Director-General lawfully exercised his discretion as to when the reclassification request was submitted to the Executive Council. Indeed, Staff Regulation 2 provides that the Director-General has discretion in deciding whether the nature of the duties and responsibilities of a post are required within the

Organisation, and the Administrative Directive of 31 January 2005 entitled "Procedures for promotion through reclassification" (hereinafter "the Reclassification Directive") requires him to take into account any budgetary limitations when considering a request for reclassification. None of these texts impose a specific time frame on the Director-General as to when a reclassification request must be submitted to the Executive Council. In the present case, he took into consideration various elements, including the financial and strategic position of the Secretariat and the financial and political positions of the Member States, and not merely the complainant's interests. It indicates that the complainant formally requested reclassification in March 2009, and that his reclassification was approved by the Executive Council in October 2010. It argues that, in light of the Tribunal's case law, the reclassification process, which lasted 17 months, was not unreasonably delayed.

The OPCW rejects the allegation of lack of good faith and states that the fact that the complainant's supervisor requested the Director-General to reclassify the complainant's post cannot be construed as a promise that the latter would submit the request to the Executive Council at its 58th Session. It also denies that the complainant was promised that he would be promoted to grade P-2 without having to participate in a selection process. It stresses that, according to paragraph 16 of the Reclassification Directive, a post that is reclassified more than one level upward shall be advertised as vacant and a selection process shall take place to fill it.

The OPCW points out that, according to Staff Regulation 1.2 and Interim Staff Rule 3.1.04, a staff member shall be expected to assume temporarily, as a normal part of his or her customary work and without extra compensation, the duties and responsibilities of higher-level posts. It therefore denies that it violated the principle of equal pay for equal work. The complainant did not consistently perform additional duties exceeding those set out in the job description for his GS-5 post. The OPCW indicates for instance that the fact that he had been alternate Head of Programme for MPB did not entail extra work, and the fact that he had been Receiving Officer on a temporary basis

could not be considered as a "significant deviation" from his usual duties. It emphasises that he was offered an *ex gratia* payment for having carried out some responsibilities, which would usually belong to a position of a higher level, but he refused it.

The OPCW submits that the compensation sought by the complainant is frivolous, unreasonable and unjustified. It adds that his request for documents is cast so widely that it should be rejected as being speculative and hence does not provide the requested documents.

D. In his rejoinder the complainant contends that the Reclassification Directive does not specify the form in which a reclassification request should be made but merely states that the incumbent has to bring the matter to his supervisor and request a review of the classification of his or her post. He did so in an e-mail of 7 April 2006 addressed to his supervisor.

He provides details of the P-2 level duties he performed and which differed significantly from the duties set out in his job description. He adds that the documents he submitted to the Tribunal were either addressed to him or forwarded to him by third parties on their own initiative. He is willing to disclose the names of the officials who supplied him with documents that were not directly addressed to him, if the Tribunal so requests.

E. In its surrejoinder the OPCW maintains its position.

CONSIDERATIONS

1. The complainant commenced employment with the OPCW on 3 February 2003 in the MPB. Effective 1 October 2005 he was appointed to a substantive position at the GS-5 grade. On the complainant's account of events, he requested in April 2006 a review of his GS-5 post and reclassification to a P-2 post. The OPCW challenged in these proceedings that such a request was made in conformity with the Reclassification Directive.

2. On 25 September 2008 a review of the job descriptions of all posts in MPB was initiated. During this process, in December 2008 a modified job description for the complainant's post was drafted. An external classifier determined on 23 March 2009 that the post as described in the modified job description would be at the P-2 level. On 22 September 2009 the complainant requested, as an interim measure, an increase of steps within his current grade to match a P-2, step 1, salary, effective 1 October 2009. This request was declined in a memorandum of 21 October 2009 from the Head of HRB, on behalf of the Director-General. On 3 November 2009, the complainant sought a review of this decision that was declined by the Director-General in a memorandum dated 30 November 2009 from the Head of HRB.

3. The complainant appealed against this decision to the Appeals Council in a notice of appeal of 23 December 2009. On 3 May 2011 the Appeals Council provided its report to the Director-General, concluding that the complainant had made out a case and recommending that appropriate compensation should be made to the complainant "for having undertaken the extra work for an extended duration of time". In a letter dated 23 May 2011, the complainant was informed by the Head of HRB that the Director-General had decided to "honour" the recommendation and offered the complainant an *ex gratia* payment of 3,000 euros. This was said to be for the extra work the complainant had carried out in developing the OPCW website and for the delay in the Appeals Council making its recommendation. This is the impugned decision. The complaint in this Tribunal was lodged on 5 August 2011.

4. In the meantime, on 22 October 2010, the complainant resigned from the OPCW with the date of separation being 21 November 2010.

5. In his complaint, the complainant seeks material damages equivalent to the difference in salary, emoluments, pension contributions and other benefits he would have received had he held

grade P-2 from 1 January 2007 to the date he left the OPCW (21 November 2010). He also seeks moral damages of 100,000 Swiss francs, and 25,000 francs for the undue delay in the internal appeal proceedings. He further seeks costs and interest.

6. During the period just described, and on the OPCW's account of the facts, various formal steps were taken in response to the external classifier's determination of 23 March 2009. The recommendation was forwarded to the Director-General on 30 March 2009. In the following six months there was internal consideration of the proposal and on 10 September 2009 the Director-General decided that the request for the reclassification should be pursued with the preparations for the 2011 OPCW Programme and Budget. The complainant was informed of this on 17 September 2009. In due course the reclassification request was submitted to the Executive Council with the 2011 budget submission on 23 September 2010. It was approved by the Executive Council on 8 October 2010. The post was advertised on 6 December 2010 and filled on 27 April 2011.

7. Three procedural issues arise from the pleadings. The first is whether the relief sought in the Tribunal is broader than the relief sought in the internal appeal and, if so, the legal consequences. The second is a request by the complainant for the production of documents. The third is whether there should be an oral hearing. In view of the conclusions the Tribunal has reached, the first issue is moot as the arguably broader relief sought was not granted. As to the production of documents, the Tribunal agrees with the submission of the OPCW that the request for documents is cast so widely as to constitute an impermissible request for documents on a speculative basis (see Judgment 2510, consideration 7). Given the issues raised by the complainant and material provided by both parties, the Tribunal sees no warrant for an oral hearing.

8. Having regard to the parties' arguments in the brief, reply, rejoinder and surrejoinder, the issues they have identified may be described in the following way. The first substantive issue is whether

the reclassification of the complainant's position was inappropriately delayed. There are two elements. The first concerns when was the reclassification of the complainant's position a matter on which the OPCW should have acted and what, at that time, should have been done. The second, and more specific element, concerns the submission of the reclassification to a 2010 Executive Council meeting rather than a 2009 Council meeting.

9. The second substantive issue is whether the complainant had been promised two things about his reclassification and whether he had a legitimate expectation that they would occur. The first thing was whether his reclassification would be submitted to a 2009 Executive Council meeting. If so, what flows from the fact it was not submitted to a 2009 Council meeting? The second thing was whether the internal rules requiring newly classified positions to be the subject of competitive applications had been waived.

10. The third substantive issue is whether there was a violation of the principle of equal pay for equal work. Two factual issues arise. The first is whether the complainant assumed duties additional to those of his substantive position at grade GS-5 from 1 January 2007. The second is whether the complainant was discharging duties under the P-2 job description.

11. The fourth substantive issue is whether there were failings in the internal appeals procedure. There are two elements. One is delay. The other is whether there was otherwise a failure to meet minimum standards.

12. Much of the detailed factual material and analysis advanced by the parties was designed to show (on the complainant's part) or rebut (on the OPCW's part) that since early 2007 the complainant had not simply been performing the tasks of the G-5 level position but had been performing the tasks of a P-2 position. This factual dispute and its resolution in the complainant's favour was in support of his claim for material damages being the difference in salary,

emoluments, pension contributions, and other benefits he would have earned or received at the P-2 level from 1 January 2007. However, the Tribunal's role is not to undertake the evaluative task of determining what is or should have been the appropriate classification for any particular position (such as that held by the complainant in January 2007 and thereafter) nor the allied evaluative task of determining what is or should have been the appropriate remuneration. In a case such as the present a complainant's right to either material or moral damages or both must be founded on a demonstrated failure of the employing organisation and its administration to comply with the applicable staff rules and regulations or the principles that have developed in this Tribunal governing the relationship between staff and an organisation.

13. A convenient starting point in considering the complainant's claims is the contention that the OPCW violated the principle of equal pay for equal work. It is important to note at the outset that until the complainant's request on 22 September 2009 for additional salary steps, the subsequent request for a review of this decision and ultimately the appeal to the Appeals Council, the complainant did not challenge, by way of internal appeal, any express or implied decision not to reclassify the position he held. The refusal of the 22 September 2009 request was the platform on which the complainant maintained his appeals that led to the Director-General's decision of 23 May 2011 impugned in these proceedings.

14. The complainant cited three judgments in support of the principle said to apply to this aspect of his complaint. The first was Judgment 2313. In that case the complainant sought to impugn a decision of the Director-General of the World Health Organization said to be embodied in a letter of 20 September 2002. In that letter the Director-General indicated there would be a classification review of the complainant's post and that she, the complainant, would have to provide information before the review was to take place. The Tribunal dismissed the complaint because the decision was not a final decision. The Tribunal referred to the principle of equality and its requirement that there be equal pay for work of equal value. The Tribunal pointed

out that there is a duty to initiate procedures to ensure that outcome. Applied to the facts of this case, this would mean nothing more than, on the assumption the complainant was not being paid equally compared to others undertaking similar work or work of a similar value, the OPCW would have been obliged to initiate procedures to create equality. This is an issue the Tribunal will address shortly. However, the judgment referred to above does not support the proposition that this Tribunal should itself embark upon the evaluation of the classification and remuneration of a particular position as a discrete enquiry.

15. Judgment 2314 was the second judgment cited. In that case the complainant had, in New York, continued to perform the duties of a post that had been transferred to Paris. For a period he was paid a special post allowance. The arrangement was terminated which led to his complaint. The Tribunal determined that the complainant was entitled to remuneration commensurate with the value of the work he had been performing. The Tribunal said that the yardstick for measuring the value was the special post allowance payable before the post was abolished in New York. Again this judgment does not support the proposition that this Tribunal should itself embark upon the evaluation of the classification and remuneration of a particular position as a discrete enquiry.

16. The third authority cited by the complainant was Judgment 2535. In that case the complainant had been assigned to a field post in Iran at the P-4 level. There was no issue that, in those circumstances, it was customary for the organisation to promote the assigned individual to the P-5/L-5 level if they were not already at that level. That had not occurred though the post the complainant occupied was reclassified P-5 effective 9 September 1999. In those circumstances the Tribunal ordered the organisation to pay the complainant arrears of salary and allowances he would have received if he had been promoted at the time the reclassification occurred. The citation by the complainant in these proceedings was for the purpose of establishing that the lack of budgetary provisions cannot be invoked

to deny a staff member a promotion or "the salary which is commensurate with the duties of the post occupied".

17. These cases involve the application of the principle of equal value for equal work in contexts removed from the facts of this case. The Tribunal rejects this aspect of the complaint to the extent that the complainant invites the Tribunal to determine that the work he did from January 2007 should properly be viewed as work at the P-2 level and that he should have been remunerated accordingly. However, it was not in dispute that he was performing work beyond his current grade (as acknowledged in a memorandum dated 30 November 2009 from the Head of HRB, as found by the Appeals Council and conceded by the OPCW in its reply to the Tribunal). He is entitled to material damages for this. He was offered an *ex gratia* payment of 3,000 euros, an offer he did not accept. This amount is inadequate. An appropriate sum is 25,000 Swiss francs.

18. It is appropriate now to consider the complainant's claim that the reclassification of his position should have been dealt with more expeditiously and, in particular, submitted to a 2009 Executive Council meeting and not the meeting held in 2010. While the complainant contended that he first sought reclassification in April 2006, it is unnecessary to descend into detail about events at this time and before early 2009 because the inescapable inference from all the material is that the complainant did not then seek to challenge, by way of internal appeal, any express or implied decision to refuse to reclassify the position he then held. It is not for the Tribunal to review the details of events of that time in the absence of the exhaustion of internal remedies in relation to any decision that may then have been made.

19. The appropriate starting point in considering this question of delay was the review of the job descriptions of all posts in MPB commencing in September 2008 and concluding, in relation to the complainant's position, with the assessment of the external classifier on 23 March 2009 that the position should be classified at the

P-2 level. The Head of MPB wrote to the Head of HRB on 30 March 2009 saying that the post then occupied by the complainant required reclassification to the P-2 level. The Acting Head of HRB wrote to the Director-General effectively inviting him to submit the reclassification request to the Executive Council. A memorandum from the Head of HRB dated 24 April 2009 proposed, amongst other things, that the reclassification of the complainant's post be reviewed during the current budget review process. A note on the memorandum indicated that the Director-General agreed with that proposal. It was a proposal also then endorsed by the Deputy Director-General. There was a suggestion in correspondence that the proposal might be put before the Executive Council in its July 2009 meeting. However, this was said in the correspondence to be for reasons that made it impractical. Those reasons were not identified and are not readily apparent from the material before the Tribunal. In any event, the implications of the reclassification were addressed in a memorandum of 19 August 2009 from the Head of the Budget, Planning and Control Branch (BUD) to the Director-General. The Head of BUD noted that if the reclassification were approved by the Executive Council in 2009 (when it met in October 2009), there would be no budgetary implications in that year because the recruitment process would preclude filling the post in 2009.

20. At some point before mid-September 2009, the Director-General decided not to submit the reclassification of the complainant's position to the Executive Council in 2009. This came to the attention of the complainant who asked why in an e-mail to the Chief of Cabinet who responded that "[t]he Director-General has decided that this matter is to be pursued during the preparations of the 2011 Program and Budget". A little over a week after this, the complainant made his request for additional salary steps as an interim measure.

21. In its reply the OPCW argued that the Director-General had validly exercised his discretion to decide when to submit the proposal for reclassification to the Executive Council. It was argued that when considering whether to submit a request for reclassification to

the Council, the Director-General does not focus exclusively on the interest of the staff member encumbering the post, but is compelled to take into account a wide range of issues, among them the strategic and financial position of the Secretariat, the political and financial positions of the Member States of the Organisation and the overall strategic and operational interests of the Organisation as such. At least some of those matters would be matters more likely for the Executive Council to consider. However even assuming the Director-General had a discretion cast as widely as suggested by the OPCW, its exercise in ways that might damage or injure a particular staff member, does not absolve the OPCW of liability for that damage or injury.

22. Staff Regulation 2 of the OPCW Staff Regulations provides that the Director-General prepare and submit to the Executive Council proposals for the reclassification of posts. The Regulation is silent about when or in what time frame. However, it cannot be doubted that such a submission should be made in a timely manner, and on the facts of this case should have involved the submission of the reclassification of the complainant's post to the October 2009 Council meeting.

23. What the consequences of this delay were depend on the resolution of another issue, namely what promises, if any, had been made to the complainant about the reclassification and what his expectations were. In view of the conclusion just reached, it is unnecessary to consider whether a promise was made to submit the reclassification to the October 2009 Executive Council meeting and whether the complainant had a corresponding expectation that this would occur. However the complainant also argued that a promise had been made that after the reclassification had been approved, he would be promoted without advertisement and recruitment. This contention was founded on what the complainant said he was told at a meeting on 9 July 2009 by the Heads of MPB and HRB and the Director of Administration. Whether the complainant's account of what was said is correct or not, the significance of those discussions was substantially diminished by an e-mail sent the same day by one of the

attendees, the Head of Recruitment, to others who attended including the complainant. The e-mail pointed out that paragraph 16 of the Reclassification Directive that covered promotion to a reclassified post required, in a case such as the present, advertisement and a competitive selection process. One of the recipients responded in an e-mail by saying that he understood the rule and did not dispute it. A copy of this e-mail was sent to the complainant. There is no evidence that thereafter the complainant challenged what had been said by the Head of Recruitment. It is unnecessary to discuss the reach of the principles developed by this Tribunal about promises and expectations. It is sufficient to say that, on the facts, the complainant would have known by the end of 9 July 2009 that whatever had been said at the meeting could not be seen to be a promise from the OPCW which he could expect to be honoured.

24. Accordingly, the delay in submitting the reclassification proposal to the Executive Council had the effect, at best for the complainant, of denying him the opportunity to apply for the position probably sometime towards the end of 2009 assuming an accommodation could have been reached with the complainant that the selection process could take place well before the expiry of his contract which was the position contemplated by the applicable rule. However the delay in reclassifying the position placed the complainant in a situation where, as noted earlier, he was performing work beyond his current grade but he had no certainty that this would be recognised by a reclassification which would provide him with the opportunity of applying for the reclassified position or, conceivably, negotiating another outcome which would result in him occupying the position (a possibility advanced by the complainant but the legality of which is unclear). In these circumstances, the complainant is entitled to moral damages occasioned by the delay. An appropriate sum is 12,000 Swiss francs.

25. The remaining issues concern the internal appeal process. The OPCW did not contest that there was considerable delay. The appeal was lodged on 23 December 2009 and not resolved until

3 May 2011. This period is too long. The complainant is entitled to moral damages for the lengthy period the internal appeal took to resolve. An appropriate sum is 5,000 Swiss francs.

26. Another basis on which the complainant seeks to impugn the internal appeal process, concerns procedural and other aspects of the Appeals Council's deliberative process. A breach of confidentiality is alleged. Also alleged is that the Council failed to meet minimum standards in its deliberations as reflected in its report.

27. As to the second point, the complainant cited Judgment 1317, consideration 33, which refers to the need for any internal appeals body to provide reasoning on issues of fact or law and to demonstrate that the body took up the complainant's pleas and the organisation's replies: to similar effect is the more recent Judgment 3222 (considerations 9 and 10). It is true, in the present case, that the Appeals Council's reasons are neither long nor, possibly, comprehensive. However, the complainant provided, with his brief, only the memorandum of 23 December 2009 initiating the appeal but not the statement of appeal or any documentation which accompanied it. In its reply the OPCW provided an extract of the statement of appeal setting out the remedies sought by the complainant. This was, the Tribunal infers, the last page of a 23-page document. None of the other pleadings and evidence are before the Tribunal. In the absence of this material, it is not possible to ascertain what ultimately were the issues and evidence before the Appeals Council. Accordingly it is not possible to evaluate, on any fair and balanced basis, whether the Appeals Council met the standards referred to at the beginning of this paragraph. This aspect of the complainant's pleas should be rejected.

28. In relation to the breach of confidentiality, the complainant contended in his brief that he provided in his rejoinder to the Appeals Council on a confidential basis, the transcripts of two meetings he attended. He also contended that sometime later, his supervisor, the Head of MPB, berated him for using this evidence in his appeal. In its reply the OPCW did not directly challenge either of these factual

contentions but rather asserted that there was "no solid evidence in support of" the claim though it is comparatively clear from the OPCW's reply that it accepted that the transcripts were furnished to the Appeals Council by the complainant. The Tribunal is prepared to accept the complainant's account of providing the transcripts and the aftermath. It can be inferred from this account that the transcripts provided to the Appeals Council were made available or their existence made known to the Head of MPB. How this occurred is not, in this matter, of any great significance. It is sufficient to note that the confidentiality sought by the complainant was not preserved by the Appeals Council. It is beside the point, as argued by the OPCW, that the creation of a transcript by the complainant of the two meetings may, in itself, have involved some moral transgression. What is in issue is the integrity of the appeal process itself. The complainant is entitled to moral damages for this breach of confidentiality in the sum of 3,000 francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The OPCW shall pay the complainant material damages in a sum of 25,000 Swiss francs plus interest at the rate of 5 per cent per annum as from 1 January 2007.

3. The OPCW shall pay the complainant moral damages totalling the sum of 20,000 Swiss francs.

4. The OPCW shall pay the complainant costs in the sum of 4,500 Swiss francs.

5. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Michael F. Moore
Hugh A. Rawlins
Catherine Comtet