

**S.**  
**v.**  
**OPCW**

**131st Session**

**Judgment No. 4373**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. M. N. S. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 7 September 2018, the OPCW's reply of 28 December 2018, the complainant's rejoinder of 11 February 2019 and the OPCW's surrejoinder of 17 May 2019;

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

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

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

The complainant challenges the decision to issue a written censure against him for breaches of his obligation to protect OPCW confidential information.

The complainant first joined the OPCW as an inspector from January 2006 to August 2009. He was re-hired in his former post in January 2011. From 15 December 2013 until 28 January 2014 he served as Head of the OPCW's Mission in the Syrian Arab Republic. He left the Organisation for personal reasons in October 2014.

In October 2014 the OPCW Head of the Media and Public Affairs Branch put the complainant in touch with a journalist from the *Wall Street Journal* (WSJ) who was preparing an article about the OPCW's operations in the Syrian Arab Republic. On 23 July 2015, the WSJ published an article entitled "Mission to Purge Syria of Chemical Weapons

Comes Up Short”. Two former OPCW staff members, including the complainant, were quoted in the article.

By a letter of 6 August 2015, the Director-General informed the complainant that a State Party had requested that an investigation be initiated into possible breaches of the complainant’s confidentiality obligations in relation to this WSJ article. The letter stated that, pursuant to the terms of the Secrecy Agreement the complainant had signed with the OPCW, he had undertaken to, at all times following his separation from service, refrain from any use, disclosure or dissemination of confidential information to which he had access in the course of his employment, except as explicitly authorised by the Director-General.

On 8 October 2015, the Head of the Office of Confidentiality and Security (OCS) informed the complainant that an assessment of the WSJ article had revealed that confidential and operationally sensitive information had been disclosed in various paragraphs of the article, including information classified as “OPCW Highly Protected” under the OPCW Policy on Confidentiality of 2 February 2006 (OPOC). As the complainant was quoted several times in the article, there was reason to believe that some of this information may have been provided by him. He was asked to provide factual information in response to a list of questions, which he did on 21 October 2015.

On 25 February 2016 the complainant was provided with a draft investigation report by the OCS and was invited to submit his comments, which he did on 10 March, denying that the information he had allegedly revealed to the WSJ was confidential.

In its final investigation report of 10 May 2016 the OCS found that, based on the complainant’s responses to the list of questions, there was proof beyond reasonable doubt that, with reference to three sections of the article, he had breached his obligations under the Secrecy Agreement which he had signed with the OPCW by revealing confidential information. Under Paragraph 6 of Part IX.1 of the OPOC this type of finding could lead to several responses, including disciplinary sanctions against former staff members. The OCS observed that the only mitigating circumstance was the fact that the complainant had been put in contact with the WSJ by the former Head of the Media and Public Affairs Branch and that he did not believe that he had disclosed confidential information. However, as an experienced OPCW inspector, the complainant was fully cognizant of the confidentiality regime of the OPCW and the former Head of the

Media and Public Affairs Branch had reminded him of the need to comply with the provisions of the Confidentiality Annex.

On 10 May the Director-General sent the complainant the final investigation report.

By a letter of 29 September 2016 the complainant was informed that the Director-General had decided to issue a written censure in response to the findings that he had, in three instances, breached his obligation to protect OPCW confidential information under paragraph 4 of his Secrecy Agreement. The Director-General had taken into account the mitigating circumstance that the complainant had been put in contact with the WSJ by the OPCW's former Head of the Media and Public Affairs Branch.

On 21 December 2016 the complainant lodged an appeal against that decision before the Appeals Council, which unanimously recommended in its report of 25 May 2018 to dismiss the appeal as unfounded.

By a letter of 12 June 2018 the complainant was informed that the Director-General had decided to follow that recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order that the Director-General issue a formal letter apologizing and clearing him of all charges. He claims 300,000 euros in material damages, including loss of income from work as a self-employed contractor based on the refusal to re-hire him at OPCW and elsewhere; 150,000 euros in moral damages; as well as costs incurred in the internal appeal proceedings and before the Tribunal, with interest on all amounts awarded.

The OPCW submits that the complaint is entirely unfounded.

## CONSIDERATIONS

1. The complainant worked for the OPCW for two periods. The first was between 8 January 2006 and 10 August 2009. The second was between 16 January 2011 and 17 October 2014. The then Head of the Media and Public Affairs Branch of the OPCW put the complainant in touch with a journalist from the *Wall Street Journal* (WSJ) in October 2014 and he was subsequently interviewed. On 23 July 2015 the WSJ published an article about the operations of the OPCW in the Syrian Arab

Republic. The complainant was quoted in the article. The Administration of the OPCW believed that the complainant's contribution to the article may have breached his confidentiality obligations to the Organisation. Additionally, on 3 August 2015 the OPCW received a formal complaint from the Syrian Arab Republic alleging, amongst other things, that the complainant had breached obligations to protect confidential information. Those obligations may have several sources but, primarily, they derived from a Secrecy Agreement the complainant signed on 17 January 2011 when he commenced his second period of service with the OPCW.

2. Paragraphs 4 and 5 of the Secrecy Agreement relevantly provide:

"4. Without limiting the foregoing, I undertake that at all times following my separation from the service of the OPCW Secretariat, I shall refrain from any use, disclosure or dissemination of confidential information to which I have had access in the course of my employment with the OPCW Secretariat, except as explicitly authorised by the Director-General, and take no action that may lead to such information being disclosed or exploited to the detriment of the OPCW Secretariat, a State Party to the Convention, or a person or commercial entity of a State Party.

5. I confirm that I am aware:

- that the OPCW Secretariat has the right to institute disciplinary measures or other sanctions against me under the Staff Regulations and Staff Rules, should I breach any provision of the OPCW Policy on Confidentiality, the administrative directives which support that Policy, or my undertakings under this Agreement; and
- that a breach of the above mentioned provisions or of the undertakings of this secrecy agreement during or after my service with the OPCW Secretariat may result in a waiver of immunity and consequent penal prosecution or civil action under the jurisdiction of a State Party of the Convention which could result in severe penalties or liability for damages."

3. After an internal investigation, the complainant was sent a letter of censure by the Director-General on 29 September 2016. The letter referred to a breach of his obligations under the Secrecy Agreement. The complainant was unsuccessful in an internal appeal heard by the Appeals Council and the Director-General dismissed the appeal on 12 June 2018. This is the decision impugned in these proceedings.

4. In his brief, the complainant develops his arguments under five general headings and, in relation to some of them, under a number of subsidiary headings and sub-headings. The first general heading is "Procedural violations". Under that general heading, the first subsidiary

heading is “Violations during the OCS investigation against the Complainant”. That in turn contains three sub-headings. The first is “Promptness of the investigation”, the second is “Objectivity, impartiality, independence and competence of investigators” and the third is “Violation of right to be heard”. The second subsidiary heading was “Violations in relation to the internal OPCW Proceedings and Letter of Censure”. That in turn contains four sub-headings. The first is the “Failure to consult with the [Joint Disciplinary Committee]”, the second is “Inordinate delay in proceedings”, the third is “Failure to provide sufficient reasons” and the fourth is “Violation of right to legal representation and to know the charges against the Complainant”.

5. The second general heading is “The nature of the allegedly confidential material”. The third general heading is “Legal challenges to the findings in the Final Report and Letter of Censure”. That in turn contains a number of subsidiary headings or sub-headings. The first is “Intention” and the second is “Gross negligence”. The third is “Lack of legal basis for sanctioning conduct” and the fourth is “Burden and standard of proof”. The fourth general heading is “Disproportionality of sanction” and the fifth is “Prejudice caused by the impugned decision”.

6. It is desirable to commence by mentioning one aspect of the third general heading, namely “Legal challenges to the findings in the Final Report and Letter of Censure”. It is the argument developed by the complainant under the sub-heading “Intention”. One factual matter should be noted. The internal investigation referred to in consideration 3 above was undertaken by two investigators, the Head of the Office of Confidentiality and Security and the Deputy Director-General, designated as Senior Investigating Officer for this investigation. They prepared a report dated 10 May 2016. The investigation report addressed a multiplicity of factual and legal issues. In paragraphs 8.1.11 and 8.1.12 the investigators said:

“8.1.11 The investigating officer found that it was certain, based on his written responses, that [the complainant] voluntarily disclosed this confidential information to the WSJ. [The complainant]’s statement that he did not disclose any confidential information indicates that he may have been unaware that the information he was disclosing was confidential.

8.1.12 Due to its inability to elicit information from the WSJ, the investigation team has no ability to determine whether or not [the complainant] was aware that the information he disclosed to the WSJ was confidential. It was also not able to determine whether or not the disclosures [the complainant] admitted to in his responses were the only disclosures he made. Nor was it able to corroborate whether [the complainant] had derived any benefits from his disclosure. Accordingly, it is only possible to conclude, based on his own admissions, that [the complainant] did not show sufficient care when he disclosed information to the WSJ. This conclusion is reinforced by the fact that despite being reminded of his obligations and encouraged to contact the OPCW if he had any doubts with regard to those obligations, he declined to do so.”

7. The investigation report later noted that the standard of proof under which the investigation was conducted was “reasonably sufficient” and that “its conclusions in respect of breaches by [the complainant] of obligations to protect confidentiality [met] the standard not merely of ‘reasonably sufficient’ evidence, but also of proof beyond a reasonable doubt”. There was no finding in the investigation report that the evidence established, beyond reasonable doubt, that the complainant knew the information he disclosed was confidential. Indeed, throughout the internal processes of the OPCW including the internal appeal, the complainant has forcefully argued that the material relied upon by the OPCW was not confidential.

8. One of the issues the complainant raised in his appeal to the Appeals Council is an issue raised in these proceedings. That is, in the absence of a finding that the complainant knew the information disclosed was confidential, no breach of his duty to maintain confidentiality could arise. This argument was not addressed by the Appeals Council and not adverted to in the Director-General’s letter of 29 September 2016, nor in the impugned decision.

9. As just noted, the complainant raised in the internal appeal the issue of his intention and *mens rea*. He challenges the adequacy of the reasons of the Director-General in deciding to censure him. His arguments on the issue of intention were essentially those advanced in these proceedings as was the OPCW’s response in the internal appeal. In the Tribunal’s view, it is an important issue generally and certainly important in this matter. It is not a topic addressed in the report of the Appeals Council whose reasoning is extremely brief and not at all detailed.

In substance, the complainant was deprived of his right to an effective internal appeal (see Judgment 4063, consideration 5). Nor is it a topic addressed in the impugned decision of the Director-General which likewise was brief, although it is true that the letter conveying the impugned decision states that:

“For the reasons given by the Appeals Council — as well as for all the other reasons set forth in the Organisation’s Response, dated 19 June 2017, and Surrejoinder, dated 15 November 2017 — the Director-General has decided to maintain his decision to reject your request for review.”

10. A final decision maker can refer to other documents which, when taken together with such reasons for decision as are given by the decision maker, can constitute the reasons for decision (see, for example, Judgment 4081, consideration 5). But the Tribunal’s approach is influenced by the circumstances and the nature of the decision (see Judgment 2927, consideration 7), and the Tribunal does not recognise the aggregation of reasons from multiple sources is appropriate in relation to disciplinary decisions (see Judgment 2112, consideration 5). The Director-General did not adequately motivate his decision to censure the complainant. Accordingly, the impugned decision of 12 June 2018 should be set aside.

11. It is unnecessary to address other issues raised by the complainant.

12. In addition to requesting that the decision be set aside, the complainant seeks material damages for lost income. However, even accepting his account of what has occurred since issues arose about his involvement in the WSJ article, the loss of income, at least as detailed in his rejoinder, flowed from the fact that an investigation was undertaken, not the ultimate censure. According to the Tribunal’s case law, a decision to open an investigation into misconduct is not a decision that affects the staff member’s status (see Judgments 4039, consideration 3, 4038, consideration 3, 3236, consideration 12, and 2364, considerations 3 and 4). Moreover, under the provisions of the OPCW Policy on Confidentiality the Director-General had no discretionary power to embark or not embark upon the investigation in the face of the allegation by the Syrian Arab Republic that a breach of confidentiality had occurred. In such circumstances Paragraph 3.3 of Part IX.1 mandates that an investigation be undertaken. Therefore, the complainant’s claim for material damages is rejected as unfounded.

13. The complainant is entitled to moral damages, which the Tribunal sets at 10,000 euros, having regard to the fact that important aspects of his defence were not addressed.

14. The complainant is entitled to an order for costs, which are assessed in the sum of 8,000 euros. However, the Tribunal considers that there are no grounds for awarding costs in respect of the internal appeal proceedings, since such costs may only be awarded under exceptional circumstances, which do not exist in the present case.

15. The complainant has requested a letter from the Director-General apologizing and clearing him of all charges. However, as the Tribunal has stated on many occasions, it is not competent to make orders of this kind (see, for example, Judgments 3069, consideration 5, and 4215, consideration 27).

#### DECISION

For the above reasons,

1. The impugned decision of 12 June 2018 is set aside.
2. The OPCW shall pay the complainant 10,000 euros in moral damages.
3. It shall pay the complainant 8,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 9 December 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.



Delivered on 18 February 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ