

M. (No. 2)

v.

OPCW

127th Session

Judgment No. 4068

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr K. M. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 11 August 2016 and corrected on 15 September, the OPCW's reply of 15 December 2016, the complainant's rejoinder of 18 April 2017 and the OPCW's surrejoinder of 12 July 2017;

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

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

The complainant contests the decision not to extend his appointment beyond the seven-year tenure.

The complainant joined the OPCW Technical Secretariat in June 2008 as the Head of the International Cooperation Branch. At that time, the mandatory retirement age for OPCW staff members was 62 and the complainant was due to reach that age in June 2016.

In a letter of 6 December 2013 he was offered a final extension of his appointment covering the period from 29 June 2014 to 28 June 2015. This extension, which he signed on 2 January 2014, carried his total length of service with the OPCW to seven years.

By decision EC-76/DEC.6 of 24 July 2014, the OPCW Executive Council raised the mandatory retirement age from 62 to 65 by means of an amendment to Interim Staff Rule 4.1.05.

On 4 September 2014 the complainant wrote to the Director-General requesting a review of the decision contained in the letter of 6 December 2013. He asked that said decision be rescinded and that he be offered a new contract based on his performance and the need for his work or, alternatively, that he be paid compensation equal to three years' salary in lieu of the three years of service that he was both capable and willing to provide. He also sought a waiver of the requirement to file an appeal so that he could seize the Tribunal directly.

By a letter of 19 September 2014, he was informed that the Director-General had rejected his request for review as time-barred because it had not been submitted within the two months required under the applicable rules. His request for a waiver of the appeal process was also rejected. On 9 October 2014 he lodged an appeal with the Appeals Council challenging the rejection of his request for review. In its report of 18 April 2016, the Appeals Council recommended that the appeal be rejected as time-barred. By a letter of 4 May 2016, the complainant was informed that the Director-General had decided to reject his appeal in line with the Appeals Council's recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the OPCW to pay him three years of gross salary at grade D-1, including all benefits, entitlements, pension contributions, step increases and other emoluments he would have received had his appointment been extended for three years from the date of his separation from the OPCW. He also claims moral damages, costs, and interest on all amounts awarded to him. Lastly, he seeks such other relief as the Tribunal deems just, necessary and equitable.

The OPCW asks the Tribunal to dismiss the complaint as time-barred and hence irreceivable or, otherwise, as unfounded.

CONSIDERATIONS

1. This complaint impugns the decision issued by a letter dated 4 May 2016. In that decision, the Director-General upheld his earlier decision of 19 September 2014, which had dismissed the complainant's request for review of the original decision issued on 6 September 2013, by which the complainant was offered a final extension of his appointment with the OPCW to 28 June 2015. At this latter date, he would have completed the seven-year tenure, which is the total normal length of service of OPCW Technical Secretariat staff under Staff Regulation 4.4(b).

Staff Regulation 4.4(a) states that the OPCW is a non-career organization, in other words an organization which does not grant permanent contracts. However, Staff Regulation 4.4(b)(ii) permits the Director-General, in consultation with States Parties "concerning options for improving linguistic services", to exclude linguistic staff from the seven-year maximum service limit based on the needs of the OPCW. The OPCW Executive Council amended Interim Staff Rule 4.1.05 by decision EC-76/DEC.6 of 24 July 2014, which raised the mandatory age of separation for all staff members from 62 to 65 and conferred discretion on the Director-General, in the interest of the OPCW, to extend this age limit in individual cases.

2. The OPCW has raised receivability as a threshold issue. The Tribunal observes that by signing on 2 January 2014 the offer of extension of appointment contained in the letter of 6 December 2013, the complainant accepted the Director-General's decision to grant him a "last and final extension of [his] fixed-term appointment, subject to the terms and conditions specified in the offer of extension, and to the provisions of the OPCW Staff Regulations, the Interim Staff Rules and related administrative issuances, including the provision that this extension does not carry any expectation of renewal or conversion to another type of appointment". However, on 4 September 2014, just over a month after the adoption of decision EC-76/DEC.6, but about nine months after the letter which offered him his final extension of appointment was issued, the complainant filed his request for review asking the Director-General to rescind the decision contained in the letter of 6 December

2013 and to offer him a new three-year contract or, alternatively, to compensate him accordingly.

3. The Tribunal determines that in the impugned decision dated 4 May 2016, the Director-General correctly accepted the Appeals Council's recommendation to reject the complainant's appeal on the ground that the underlying request for review was time-barred. The decision which the complainant challenged in his request for review was that contained in the letter of 6 December 2013, by which he was offered a final extension of his appointment which he accepted on 2 January 2014. It was not the Executive Council decision EC-76/DEC.6 of 24 July 2014 amending Interim Staff Rule 4.1.05, as the complainant seems to suggest. Interim Staff Rule 11.2.02(a) required the complainant to submit his request for review of the decision contained in the letter of 6 December 2013 to the Director-General within two months from the date on which he received notification of that decision. It is clear from the file that the complainant had received the letter of 6 December by 2 January 2014, when he signed the final extension of his appointment contained therein. His request for review filed on 4 September 2014 was, therefore, clearly out of time.

4. Interim Staff Rule 11.2.03(f) states that an appeal shall not be receivable unless the two-month time limit provided for in Interim Staff Rule 11.2.02(a) has been complied with or has been waived by the Appeals Council in exceptional circumstances. In the case under review, the Appeals Council did not waive the time limit. It found that the complainant had failed to show why the date on which decision EC-76/DEC.6 was adopted, whereby the mandatory retirement age was raised from 62 to 65, was the effective date from which the receivability of his request for review was to be determined. The Tribunal finds no relationship between the amendment to Interim Staff Rule 4.1.05 and the decision contained in the letter of 6 December 2013, which was in fact the focus of the complainant's challenge. This latter decision was based solely upon Staff Regulation 4.4(a) and (b). Having failed to submit his request for review within two months from the time when he was notified of the 6 December 2013 decision and in the absence of a waiver of that time

limit by the Appeals Council, the complainant's request for review and subsequent appeal were irreceivable. The result is that the complainant did not exhaust the internal remedies, as required by Article VII, paragraph 1, of the Tribunal's Statute. Accordingly, the complaint is irreceivable and will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 24 October 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ