

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

W.
v.
OPCW

141st Session

Judgment No. 5122

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr B. W. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 6 July 2022 and corrected on 21 July, the OPCW's reply of 11 November 2022, the complainant's rejoinder of 7 April 2023 and the OPCW's surrejoinder of 4 September 2023;

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 may be summed up as follows:

The complainant challenges the decision to impose upon him the disciplinary measure of written censure and to bar him from any future employment with the OPCW for alleged breaches of his confidentiality obligations.

The complainant first worked for the OPCW from 1998 to 2011. He was rehired from 4 September 2015 to 3 September 2018 to serve as an Inspector. Upon being rehired, he signed a Secrecy Agreement with the OPCW requiring him to comply with the OPCW Staff Regulations and Interim Staff Rules and the OPCW Policy on Confidentiality, including all Administrative Directives supporting that Policy, both in the course of his employment and following his separation from the OPCW.

In April 2018, the complainant was deployed to Syria as a member of the fact-finding mission tasked to investigate the alleged use of chemical weapons in Douma, Syria, on 7 April 2018. Following his return from Syria, he was involved in the drafting of the “Interim Report of the OPCW Fact-Finding Mission in Syria regarding the Incident of Alleged Use of Toxic Chemicals as a Weapon in Douma, Syrian Arab Republic, on 7 April 2018” (the Interim Report).

On 22 June 2018, prior to the public release of the Interim Report, the complainant sent an email to the Chief of Cabinet, copying the Deputy Chief of Cabinet and all team members, in which he expressed “Grave concern about the ‘redacted’ Douma report”. The complainant asserted that the Interim Report to be released misrepresented the facts and that some facts were selectively omitted while other facts remaining in the report had morphed into something quite different than what was in the original report. He requested to attach his differing observations in the event the redacted version was to be released. By an email of that same day, the Chief of Cabinet replied that the Interim Report still required a large amount of work and suggesting that the complainant meet with the other team members for further discussion. The complainant then forwarded this email from the Chief of Cabinet to the Director, Office for Strategy and Policy (OSP).

On 3 July 2018, the Chief of Cabinet wrote to the complainant asking if the fact-finding mission team had agreed on the way forward with the draft Interim Report. The complainant replied that he had joined two of the team members to review the redacted report and they had come up with a final draft. In a subsequent email, the Chief of Cabinet asked if everyone agreed with the final draft, to which the complainant replied that not everyone in the team had been invited but that those present had agreed. The complainant separated from the OPCW on 3 September 2018.

Prior to that, on 6 July 2018, the OPCW released the Interim Report. Some eight months later, on 1 March 2019, the OPCW released the final version under the title “Report of the Fact-Finding Mission regarding the Incident of Alleged Use of Toxic Chemicals as a Weapon in Douma, Syrian Arab Republic, on 7 April 2018” (the Final Report).

On 25 March 2019, the complainant wrote a letter to the Director-General to inform him of the major concerns he had about what he considered to be serious defects and irregularities in the conduct of the investigation by the fact-finding mission into the Douma incident and his disagreement with certain conclusions in the Final Report. The complainant outlined the facts which, in his view, served “to underscore [his] grave concerns” regarding the conduct of the investigation and he expressed concern that facts had been misrepresented and highly questionable conclusions drawn in the Final Report. In closing, the complainant stated his readiness to defend his claims and offered to make himself available to do so. Expressing the confidence that the Director-General would welcome the opportunity for the matter to be clarified internally, within the Technical Secretariat, he stated his eagerness for the possibility to offer his perspective.

On 4 April 2019, the complainant wrote to the Director, OSP, informing her of his unsuccessful attempts to “get [his] views to the [Director-General]” and seeking her assistance in informing him of the events surrounding the investigation and of his “privileged knowledge” in this respect. Following an exchange of correspondence, it was agreed that the complainant would send his letter to the Director, OSP, for transmittal to the Director-General. On 18 April 2019, the Director, OSP, sent an email to the complainant confirming that the Chief of Cabinet was “perfectly OK with receiving [his] letter”. On 23 April 2019, the complainant sent a letter dated 25 April 2019 (which was in essence the same letter he had sent to the Director-General on 25 March 2019) to the Director, OSP, for transmittal to the Director-General. On 1 May 2019, the Director, OSP, informed the complainant that his letter had arrived safely that day, that she had it in a folder, and that she would hand it over to the Chief of Cabinet by the end of the week.

On 7 June 2019, the Director-General wrote to the complainant acknowledging receipt of his letters dated 25 March 2019 and 25 April 2019. The Director-General recognised that the complainant had been asked to support the fact-finding mission in the Douma deployment but pointed out, nevertheless, that as the complainant had completed the handover of confidential material by 3 August 2018 and had left the

OPCW by 3 September 2018, he could not have been aware of the activities carried out or the information and data collected, analysed and considered after his departure and before the publication of the Final Report on 1 March 2019. The Director-General reminded the complainant that the obligations he had undertaken under the Secrecy Agreement applied even after his separation from the OPCW and stated his “trust” that the complainant would “fulfil them”.

Prior to that, on or about 13 May 2019, an OPCW internal document entitled “Engineering Assessment of Two Cylinders Observed at the Douma Incident – Executive Summary” (the Engineering Assessment) was published on the Internet. The document, dated 27 February 2019, purported to contain information on the findings of the fact-finding mission tasked to investigate the alleged use of chemical weapons in Douma. On 8 July 2019, the Director-General opened an investigation into alleged breaches of confidentiality in connection with the 13 May 2019 unauthorised online publication and he relevantly notified the Deputy Director-General by a memorandum of the same day. In that memorandum, the Director-General designated the Deputy Director-General as the Senior Investigative Officer, appointed external investigators to carry out the investigation, and identified as the aim of the investigation to establish whether there had been a breach of confidentiality or a violation of the handling, protection, dissemination, or release procedures for confidential information – including the terms of any Secrecy Agreement signed by current and former staff members – and the severity of any breach, including the degree and nature of any damage caused.

On 28 August 2019, the investigators sent an email to the complainant to inform him that he had come to their attention as a “possible subject of inquiries who may have valuable information to provide to the fact-finding investigation” and to invite him to an interview to be conducted in person or remotely. The complainant replied on 2 September 2019, inquiring about his status in the investigation. Noting that the category of “possible subjects” did not exist, he asked the investigators to clarify in what capacity they wanted him to do an interview. On 4 September 2019, the investigators

responded that for the purposes of the investigation the complainant was considered a “subject” and proposed possible dates for the interview. The complainant replied, by email, on 11 September 2019. Relying on Administrative Directive AD/ADM/26, “Uniform Guidelines for Investigations”, he asked to be provided with clarification on the exact nature and scope of the complaint(s) against him, including (i) for which unauthorised disclosures he was considered the subject of investigation; and (ii) whether the complaint(s) included “alleged criminal conduct” or “acts contrary to the rules and regulations of the Organisation”, and he also asked to be provided with all the evidence pertaining to the accusation(s). Moreover, he inquired about the applicable standard of proof and asked to avail himself of the right to be interviewed in the presence of an observer and a confirmation that he would receive a copy of the full investigation report.

By a letter of 20 September 2019 (transmitted under cover of an email of 23 September 2019), the Director-General informed the complainant that in the course of the investigation opened on 8 July 2019 (into alleged breaches of confidentiality in connection with the 13 May 2019 online publication), information had come to light indicating that the complainant might have been involved in the alleged breaches under investigation. The Director-General noted that while the document published online was labelled “unclassified”, it contained confidential information that would be classified as Highly Protected under the OPCW Policy on Confidentiality. The Director-General reminded the complainant of his confidentiality obligations under the Secrecy Agreement he had signed and invited him to fully cooperate and support the investigation. In the 23 September 2019 email transmitting the aforementioned letter, the Office of the Director-General responded to some of the points raised by the complainant in his 11 September 2019 email. Specifically, the Office of the Director-General indicated that the aim of the investigation was to establish whether there had been a breach of confidentiality, in which case the OPCW Policy on Confidentiality provided for a range of possible measures; that misconduct had to be established beyond reasonable doubt before a disciplinary measure might be imposed; that prior to the issuance of the Investigation Report a copy thereof would be made available to the

complainant for his comments; that only an OPCW serving staff member authorised to have access to confidential information could serve as observer during the complainant's interview.

On 1 October 2019, the investigators wrote to the complainant again requesting to interview him. The complainant replied on 2 October 2019, asking once again to be provided with clarification as to the breaches of confidentiality in respect of which he was a subject of the investigation, the details of each complaint against him, and all the evidence regarding his suspected involvement. The investigators replied, on 7 October 2019, that the investigation was looking into the unauthorized disclosure of confidential information related to the OPCW's investigation in Douma and that the complainant had been identified as a subject of the investigation into the alleged leak of Douma-related information on the Internet, to a State Party, and to members of the Technical Secretariat not authorized to receive this information. They added that they would not be sharing more information at that stage but that the complainant would be given an opportunity to view the draft Investigation Report (detailing the evidence collected) and to comment thereon before it was finalised. On 18 October 2019, the complainant wrote back expressing his disappointment at the investigators' unwillingness to cooperate in his efforts to voluntarily put himself at their disposal for interview so that he could clear his name of the misplaced accusation of leaking the Engineering Assessment in May 2019. He categorically denied leaking the Engineering Assessment and stated he had only asked that the investigators fulfil their obligations under the Administrative Directive on Internal Investigation Procedures, but suspected they would not provide the evidence against him for the simple reason they did not have any as no evidence could exist.

By a letter of 15 January 2020, the Director-General informed the complainant that the investigation had concluded and offered him the opportunity to view and provide his comments on the draft Investigation Report before its formal issuance. The Director-General noted that the Report was confidential and could therefore only be viewed at the OPCW's Headquarters until 26 January 2020; should the

complainant wish to view it, the OPCW would provide him access to the Report for a period of one business day during normal working hours; the OPCW would also make the necessary arrangements and fund his travel and stay in The Hague, the Netherlands. The Director-General invited the complainant to respond by 17 January 2020, failing which the Administration would proceed with the formal issuance of the Investigation Report.

In an email of 17 January 2020, the complainant stated he would consider the opportunity to view the Investigation Report and provide his comments thereon despite the lack of due process in the investigation. Relying on provisions of the OPCW Policy on Confidentiality, he asserted his right to receive a copy of the “modified” non-confidential version of the report, either by post or by email, in order “to allow [him] adequate time to read and digest its contents, and if necessary seek advice on [his] comments”. On 20 January 2020, the Office of the Director-General acknowledged the complainant’s email purportedly informing the OPCW that he would not be availing himself of the opportunity to make comments on the full report. The complainant immediately responded clarifying that he wished to read the full Investigation Report but was simply asking to receive the “modified” non-confidential version beforehand so as to adequately prepare to provide his comments. On 21 January 2020, the Office of the Director-General replied that the complainant was being offered the opportunity to review, analyse, and make comments on the draft Investigation Report, and that a full day had been scheduled for him at the OPCW Headquarters. The complainant wrote back on 22 January 2020 requesting confirmation that he could be accompanied by a lawyer of his choice, review the report in private, and take away a copy of the full report. The Office of the Director-General denied his requests indicating that he did not have the right to be represented by counsel, that he would not be able to retain a copy of the report, and that his review of the report would be monitored to ensure respect of the OPCW’s confidentiality regime but this would not impede his ability to review it and provide his comments.

On 24 January 2020, the complainant's counsel wrote to the Director-General requesting confirmation that his client had the right:

- to see, on OPCW premises, the full and unredacted confidential version of the Report, together with all underlying information gathered in the course of the investigation, whether allegedly incriminating or exculpatory, without monitoring by the OPCW and to be given sufficient time to do so effectively;
- to obtain a copy of the redacted version of the Report, which he could take with him away from the OPCW premises;
- to be assisted in viewing the Report by counsel fulfilling the requirements for representing staff members before the Tribunal;
- to have “privileged conversations with [c]ounsel of his choice regarding the Report, outside the sight and hearing of the OPCW”;
- to be given adequate time and facilities to prepare and provide his comments on the Report and for these comments to be adequately and thoroughly examined by the investigators before the Report was presented to the Executive Council.

The Office of the Director-General wrote to the complainant that same day to inform him that he did not have the right to a legal representative at that stage of the process and to invite him to communicate directly with the OPCW. The Office of the Director-General also informed him that, in a “spirit of good faith”, it was extending the deadline to review the draft report at the OPCW Headquarters until 28 January 2020 and reiterated it would make the arrangements to cover the costs of the complainant's travel to The Hague. The complainant's counsel replied by email of 26 January 2020 that his client would not be viewing the report under the conditions imposed.

On 6 February 2020, the OPCW issued the “Report of the Investigation into Possible Breaches of Confidentiality”, i.e. the “modified” non-confidential version of the Investigation Report. In respect of the complainant, whom it identified as Inspector B, the report concluded that he had violated his obligations concerning the protection of confidential information due to his unauthorised disclosure of

confidential information to individuals who did not have a need to know such information, and that he had failed to comply with the specified procedures for the handling, protection, release, and dissemination of confidential information so as to create a clear risk of unauthorised disclosure. Also on 6 February 2020, the Director-General held a briefing of the States Parties on the aforementioned report at which he specifically referred to the investigative findings and conclusions in respect of the complainant and undertook to take appropriate actions in response thereto.

The next day, on 7 February 2020, the Director-General issued the complainant a Letter of Censure imposing on him the disciplinary measure of written censure for breaches of confidentiality and violation of obligations to protect OPCW confidential information, as set forth in the Secrecy Agreement he had signed with the OPCW. The Director-General also barred the complainant from any future employment with the OPCW. On 19 March 2020, the complainant's counsel informed the Director-General that the complainant intended to appeal the disciplinary measure and requested a waiver of the Appeals Council's "jurisdiction" on the ground that the Director-General's public statement to the OPCW State Parties on 6 February 2020 had rendered it impossible for the Appeals Council to issue an independent and impartial assessment. This request was rejected and, on 6 April 2020, the complainant filed an appeal with the Appeals Council contesting the 7 February 2020 decision and seeking a public statement by the Director-General formally clearing him of any wrongdoing, compensation for loss of income, moral damages, and costs.

In its report of 8 March 2022, the Appeals Council recommended that the appeal be rejected for being without merit. The Appeals Council held that the OPCW had adhered to relevant administrative rules and regulations both in the course of the investigation and in imposing the disciplinary measure; that referral to the Joint Disciplinary Committee was not a pre-requisite to the imposition of the disciplinary measure on the complainant; and that the Secretary-General had acted within his authority in denying the request for a waiver of the Appeals Council's "jurisdiction".

By a letter of 11 April 2022, the Director of Administration informed the complainant that the Director-General had decided to maintain the 7 February 2020 Letter of Censure. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the Director-General to publicly and formally clear him of any wrongdoing, either by way of amendment to the Investigation Report and his Statement to the OPCW Member States and/or some other official publication. He claims 350,000 euros in moral damages and 10,000 euros in costs.

The OPCW asks the Tribunal to dismiss the complaint and all of the complainant's claims.

CONSIDERATIONS

1. The complainant applies for oral proceedings, pursuant to Article 12, paragraph 1, of the Tribunal's Rules. He asks the Tribunal to call the Director-General to testify as a witness in order to clarify alleged important incoherencies in his public statements to the OPCW Member States and to the United Nations Security Council, among others, about (i) how his (the complainant's) alleged breach of confidentiality in forwarding an internal email to a senior director in June 2018 could result in the leaked Engineering Assessment being used to call into question the work of the Secretariat in 2019; (ii) how his sending two private letters to the Director-General created a risk that materialized in the publication of the Engineering Assessment on the Internet, and (iii) what reports the Director-General is referring to when he assured the United Nations Security Council in June 2021 that "The conclusions of the reports produced personally by Inspector B, are, of course, erroneous and uninformed". The complainant also wishes to call one of the external investigators to determine precisely how they went about initiating their investigation into his alleged misconduct and to uncover the scope of their investigation among other issues. The complainant's request for an oral hearing is rejected. As the OPCW states, in effect, it is unnecessary to conduct such a hearing, because the

written pleadings and documents produced by the parties are sufficient to permit the Tribunal to reach an informed decision on the issues raised in this complaint.

2. Summarizing his case, in his brief, the complainant states that the OPCW “failed on multiple fronts to conduct an impartial and meaningful investigation of the allegations it made against [him], violating his right of due process from the initial notification stage through to the issuance of the final report and the Director-General’s subsequent briefing to Member States. The [OPCW] disregarded [its] own protocols and procedures for investigating alleged breaches of confidentiality, violated fundamental legal tenets, and charged [him] with spurious and contradictory allegations that have no grounding in fact or evidence.”

In its defence, the OPCW states that this case is about the complainant who was found to be in breach of his obligations under its “unique and strict confidentiality regime”, including the Secrecy Agreement he had signed, for which breach he was issued with a written censure in accordance with the OPCW’s applicable internal rules regime. That sanction was issued after a duly appointed investigation team found, beyond a reasonable doubt, that he had breached his confidentiality obligations, in that he had (i) disclosed the OPCW’s Highly Protected confidential information to at least one staff member who did not have the need-to-know about that information, and (ii) created and transmitted letters, dated 25 March 2019 and 25 April 2019, in a manner that failed to comply with the specified procedures for the handling, protection, release, and dissemination of confidential information. These were clear violations of the OPCW confidentiality regime regardless of whether he did those acts deliberately or premeditatedly. The subject violations were identified in the context of a wider investigation into a serious leak of Highly Protected information. The complainant’s rights to due process were respected during the investigation. He seeks to challenge, belatedly, the facts established in the investigation, in which he did not participate “despite being repeatedly invited to do so and being required to participate”.

3. Regarding the applicable general principles, consistent precedent has it that decisions which are made in disciplinary cases are within the discretionary authority of the executive head of an international organization and are subject to limited review. The Tribunal will interfere only if the decision is tainted by a procedural or substantive flaw. Moreover, where there is an investigation by an investigative body in disciplinary proceedings, the Tribunal's role is not to reweigh the evidence collected by it, as reserve must be exercised before calling into question the findings of such a body and reviewing its assessment of the evidence. The Tribunal will interfere only in the case of manifest error (see, for example, Judgments 4343, consideration 4, 4106, consideration 12, and 3872, consideration 2). The case law also states, in relation to the question of whether the alleged conduct took place, that the burden of proof rests on an organisation to prove allegations of misconduct beyond a reasonable doubt before a disciplinary sanction can be imposed (see, for example, Judgments 4749, consideration 5, 4227, consideration 6, and 3862, consideration 20).

4. In challenging the impugned decision on procedural and substantive grounds, the complainant asks the Tribunal to set aside the impugned decision and to award him moral damages taking into consideration alleged aggravating circumstances. He also asks the Tribunal to order the Director-General to publicly and formally clear him of any wrongdoing, either by way of amendment to the Investigation Report and his Statement to Member States and/or some other official publication.

5. The nature of the activities which fall within the mandate of the OPCW underlines the critical importance of confidentiality in its operations, including its inspections. This was recognized in Part I, paragraph 2, of the OPCW Policy on Confidentiality, which stated that “[a] policy for confidential information is essential to the work of the Organisation because of the intrusive verification measures which are aimed at promoting confidence in compliance with [the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the Convention)] while

respecting States Parties' legitimate concerns about the possible disclosure of sensitive information". This was also recognized in paragraph 5 of Article VIII of the Convention itself, which required the Organisation to conduct its verification activities "in the least intrusive manner possible consistent with the timely and efficient accomplishment of their objectives", to "request only the information and data necessary to fulfil its responsibilities under [the] Convention" to "take every precaution to protect the confidentiality of information on civil and military activities and facilities coming to its knowledge in the implementation of [the] Convention" and, in particular, to "abide by the provisions set forth in the [Annex on the Protection of Confidential Information] Confidentiality Annex".

6. The Confidentiality Annex tasked the Director-General in Section A, paragraph 2, with the primary responsibility for ensuring the protection of confidential information and to establish a stringent regime governing the handling of such information within certain guidelines. This was also the purport of Part IV, paragraph 2, of the Policy on Confidentiality. Provisions were made in Section B of the Confidentiality Annex for the conditions of employment of staff employed in the Technical Secretariat to be in conformity with the procedures the Director-General established pursuant to Section A.

7. Section B, paragraph 7, of the Confidentiality Annex stated, in part, that the Director-General, the inspectors and other staff members shall not disclose any confidential information, which came to their knowledge in the performance of their official duties, to any unauthorized persons even after termination of their functions. Section B, paragraph 9, of the Confidentiality Annex required staff to enter into individual secrecy agreements with the Technical Secretariat.

The complainant signed such an agreement on 4 September 2015. In it, he confirmed that he had familiarized himself with all relevant OPCW rules related to his confidentiality obligations as an inspector, including the Confidentiality Annex to the Convention, the Policy on Confidentiality and its supporting Administrative Directives, and the Manual of Confidentiality Procedure (MCP). He undertook, among

other things, to comply with his obligations thereunder as a condition of his employment with the Technical Secretariat; refrain, for the duration of his employment and for a period of five years following his separation, from any disclosure or dissemination of confidential information to which he had access in the course of his employment, except as explicitly authorized by the Director-General; take no action which may cause such information to be disclosed or exploited; respect and apply the procedures established by the OPCW's confidentiality regime; refrain from disclosing such confidential information to persons not authorized to receive it; refrain from any unauthorized use of such information, including unauthorized use for his benefit or the benefit of a third party, or which may damage the interest of any party. The complainant confirmed, among other things, that he was aware that the OPCW Secretariat had the right to institute disciplinary measures or other sanctions against him under the Staff Regulations and Interim Staff Rules, should he breach his obligation to confidentiality under the agreement or any provision of the OPCW confidentiality regime.

Section D, paragraph 19, of the Confidentiality Annex tasked the Director-General to ensure the implementation of the individual secrecy agreements and to promptly initiate an investigation if, in his judgment, there was sufficient indication that obligations concerning the protection of confidential information had been violated. Section D, paragraph 20, of the Confidentiality Annex empowered the Director-General to impose appropriate disciplinary measures on staff members who violated their obligations to protect confidential information.

8. A four-step procedure for investigating alleged breaches of confidentiality and the violation of confidentiality obligations was provided in Part IX of the Policy on Confidentiality. Paragraph 1.2 stated, in part, that a breach of those obligations included any unauthorised disclosure of OPCW information to any individual regardless of the intention or the consequences of the disclosure.

In step 1 of the investigation procedure, paragraph 1.3 of Part IX of the Policy on Confidentiality mandated the Director-General to promptly initiate an investigation following "sufficient indication" that

there had been a violation of an obligation by a staff member to protect confidential information. Paragraph 1.6 of Part IX of the Policy on Confidentiality required the Director-General to inform, immediately and in writing, any State Party and any staff member or contracted personnel involved in alleged breach or suspected violation of those obligations.

9. Paragraph 1.7 of Part IX of the Policy on Confidentiality stated that the aim of an investigation was to establish, among other things, whether there had been a breach of confidentiality or a violation of the handling, protection, dissemination or release procedures for confidential information, and the severity of any breach. These were the bases on which the Director-General initiated the investigation into the leak of the Engineering Assessment.

Paragraph 1.8 of Part IX of the Policy on Confidentiality stated as follows: “The Director-General shall be directly responsible for the investigation, and will direct it personally, but may designate a senior staff member to conduct investigatory work. The investigation should commence with a preliminary review of the circumstances surrounding the allegation or indication of a violation, and a consideration of any evidence or supporting information. [...] Following the establishment of a *prima facie* case of a breach affecting the interests of a State Party, the Director-General shall notify the Executive Council that an investigation into a breach is in progress and, with the consent of that State Party, may present specific information about the investigation, if requested.”

10. Paragraph 1.9 of Part IX of the Policy on Confidentiality stated that the investigation procedure following the establishment of a *prima facie* case may include, among other things, the collection and examination of evidence within the OPCW or its constituent organs and confidential interviews with staff members of the Secretariat. Paragraph 1.10 of Part IX stated, in part: “The proceedings of the investigation will remain confidential, and will be subject to the strict application of the need-to-know principle. [...] The investigation should be conducted on the basis of objectivity and due process, and there

should be no use of coercion to elicit information from any individual concerned. Every effort should be made to conclude the investigation and take appropriate action in response to its findings as quickly as is possible and consistent with proper procedure.”

Paragraph 1.11 of Part IX stated that all States Parties concerned and all staff members of the Secretariat involved shall cooperate with and support the investigation to the extent possible.

11. Step 3 of the investigation procedure provided, in paragraphs 1.17 to 1.22 of Part IX of the Policy on Confidentiality, for the “Report of investigations”. Paragraph 1.17 of Part IX mandated the Director-General to prepare a report of the investigation stating whether there had been a breach of confidentiality or a violation of the handling, protection, dissemination or release procedures for confidential information. It further required the report to be prepared in two forms: a full form setting out the facts determined in detail, and a modified form from which specific confidential material was removed to ensure that confidential information connected with a breach was not further disclosed beyond its authorised scope of access, and to respect those elements of the privacy of individual staff members that were not relevant to the case.

Paragraph 1.18 of Part IX of the Policy on Confidentiality stated, in part, that the full report shall be treated as confidential, to be classified and handled according to its sensitivity. It should be made available only to all those who are directly involved in the investigation, including any individual staff members implicated in a breach or alleged breach. In its modified form, the report may have been made available to any State Party upon request. Paragraph 1.19 stated, in part, that when the report found there had been a breach of confidentiality, there should be an account of the degree of severity of the breach, with reference to specified factors.

12. Step 4(b) of the investigation procedure provided the sanctions which the Director-General may have imposed upon a former OPCW staff member, as the complainant was at the material time.

Under paragraph 1.27(a) and (b), respectively, the Director-General was permitted to apply the disciplinary measures of written censure and to bar a former member of staff from any future employment at the OPCW.

13. Other provisions which governed the conduct of the investigation procedure, to which the Tribunal will refer as necessary in assessing the parties' submissions on the investigation conducted in this case, were made in the MCP; the OPCW Staff Regulations and Interim Staff Rules, as well as in the Uniform Guidelines for Investigations, contained in Administrative Directive AD/ADM/26, in force at the material time.

14. Three submissions the complainant proffers to support his challenge to the impugned decision on procedural grounds are unfounded.

In the first, the complainant challenges what he refers to as the Director-General's decision not to waive the Appeals Council's jurisdiction and permit him to lodge his appeal directly to the Tribunal. Rule 11.3.01(b) of the Staff Regulations and Interim Staff Rules stated that "[a] staff member may, in agreement with the Director-General, waive the jurisdiction of the Appeals Council and appeal directly to the Administrative Tribunal of the International Labour Organisation, in accordance with the provisions of the Statute of that Tribunal".

15. The complainant argues, in effect, that the Director-General's decision whether or not to waive the Appeals Council's jurisdiction was a discretionary decision, which is vitiated by abuse of authority because he provided no reason for his refusal, and, additionally, as he had made the initial decision to issue him with disciplinary measures and had made statements to staff members, including members of the Appeals Council, his decision was vitiated by a conflict of interest. The complainant however notes that the Head of Human Resources had, in justifying the decision, on behalf of the Director-General, stated, as the reason for not agreeing to waive the Appeals Council's jurisdiction, that "the Appeals Council [was] capable of handling any eventual appeal in

the present matter in an impartial, fair, and prompt manner”. In the Tribunal’s view, this was sufficient justification. The Tribunal does not discern how a vitiating conflict of interest arose on the bases the complainant proffers. More critically, however, on the wording of Rule 11.3.01(b), it is inaccurate for the complainant to state that it was within the discretion of the Director-General to waive the jurisdiction of the Appeals Council. It is the complainant who may have waived that jurisdiction with the agreement of the Director-General, to which the latter did not accede.

16. In the second place, the complainant submits that his right to have an independent and impartial investigation of the allegations against him was violated because the use of external investigators was not authorized under the OPCW rules. He submits, citing, among others, paragraphs 1.8 and 1.17 of Part IX of the Policy on Confidentiality (outlined above in considerations 9 and 11, respectively) and paragraphs 1016 and 1022 of the MCP. Paragraph 1016 stated that in accordance with paragraph 3.6 of Part IX.1 of the Policy on Confidentiality, the leading role in carrying out investigations, shall, in practice, be taken by a Senior Investigating Officer (SIO) answerable to the Director-General. The SIO should be the Deputy Director-General, in particularly sensitive or complicated cases; the Head of the Office of Confidentiality and Security (OCS), in other cases where a breach of the OPCW Security Programme is involved; the Head of OCS or the Confidentiality Auditor, as appropriate, in other cases of alleged breach of confidentiality. Among other things, paragraph 1022 stated that the SIO shall submit all investigation reports to the Director-General who shall not permit access to them by any person other than members of the investigation team. The complainant argues that these provisions make clear that the Director-General must either conduct the investigation personally, or delegate it to a SIO because there is no specific provision for the Director-General to delegate it to someone who is external to the OPCW.

However, as the Appeals Council correctly concluded, in its opinion, which the Director-General endorsed in the impugned decision, while those provisions implied that a SIO was to take the leading role

in an investigation, they did not exclude the constitution of an investigation team to assist in the conduct of the investigation and to prepare the report, particularly where, as in this case the OPCW had exercised due diligence by, among other things, requiring the two independent investigators who constituted the investigation team to sign individual secrecy agreements.

17. In the third place, the complainant submits, in effect, that the impugned decision wrongly determined that he was not denied his right to have a legal representative, or even an observer of his choice, to accompany him in the investigation and review of the investigation report. Notably, under the Tribunal's case law, a complainant has no general right to legal representation in all circumstances during an investigation (see, for example, Judgment 2589, consideration 7). Moreover, there was no rule that mandated that a subject of an investigation was entitled to legal representation therein.

18. In its opinion, the Appeals Council cited Rule 10.2.03 of the Staff Regulations and Interim Staff Rules and noted that there was no provision in the Organisation's internal legislation that supported the complainant's claim that he had the right to be represented by counsel during the investigation proceedings or to be assisted by counsel in reviewing the draft Final Investigation Report. The Appeals Council also noted that a legal representative was not included in the list of persons who may assist in disciplinary proceedings.

19. The complainant cites paragraph IV(B)(5) of the Uniform Guidelines for Investigations. It stated: "[w]hen practicable, interviews should be conducted by two investigators. A complainant, witness, or subject can request to be accompanied in an interview by an observer who has no connection to the investigation and is readily available. The observer is not allowed to speak or to act as an interpreter during the interview. When an observer joins an interviewee, the interview must be conducted by two investigators."

The complainant refers to an email of 23 September 2019 from the Office of the Director-General, which advised him that he may be accompanied to his proposed interview by an observer but that “only a currently serving OPCW staff member who is authorised to have access to confidential information may serve as an observer” and any such observer had to “sign a non-disclosure form prohibiting him/her from disclosing any details of the interview afterwards”. He submits that this was a restriction on his right under paragraph IV(B)(5) of the Uniform Guidelines for Investigations. In the Tribunal’s view, however, it was a necessary restriction for the very reason stated in the email message.

20. The complainant submits, in effect, that the OPCW failed to conduct a preliminary investigation in accordance with Chapter 10, paragraph 1006 of the MCP, which relevantly stated that “[i]ndividuals uncovering any evidence or suggestion of a compromise [of confidential information] shall verbally inform OCS at the earliest opportunity, and confirm their action in accordance with the reporting procedure set out [in the MCP] as soon as possible thereafter”. The complainant refers to paragraph 1010 of the MCP which relevantly stated that “[i]n all cases, the initial report of any breach of confidentiality must be made by the most expedient means [and] should be referred to the Head of OCS or an OCS Confidentiality Officer either by phone or e-mail”. He further refers to paragraph 1011, which stated, in part, that “[f]ollowing the initial reporting of any incident [...] the reporting individual must [...] fill out a C90 [form]. The completed C90 and any supporting documents shall be sent directly to the Head of OCS.” The complainant then notes, with apparent reference to paragraph 1012 of the MCP, that the procedure then required the OCS to consider the C90 incident report to determine whether there was “sufficient indication of a violation of the obligation to protect OPCW confidential information” and to report the facts of the incident to the Director-General on an OPCW Preliminary Inquiry Report (C90A). The OCS was then to inform the Director-General of the outcome of the preliminary inquiry by a C90A form, and, pursuant to paragraph 1014 of the MCP, the Director-General was thereupon to determine, based upon the recommendation of the Head of OCS, whether it was necessary to further investigate the reported

incident. The complainant further refers to paragraph 1015 of the MCP, which was to the effect that, if the Director-General decided from the C90A report that there was “sufficient indication” of a possible breach of confidentiality, he could order a full investigation into the incident. Notably, paragraph 1015 further stated that such an investigation was to be conducted into all actual or suspected breaches of the OPCW confidentiality regime, and subsequent reports shall be produced and submitted in accordance with the procedures set out in paragraphs 1016 and following, under which the investigation was to be conducted in accordance with Part IX.1 of the Policy on Confidentiality.

21. Against the foregoing background, the complainant argues that, whilst it appears that the procedures in Chapter 10 of the MCP were generally followed to initiate the investigation “related to the creation and unauthorised release of the Engineering Summary”, that procedure was not engaged to initiate an investigation “into the newly discovered and unrelated alleged breach [of confidentiality] by [him]”, which was, according to the complainant, “an internal matter known only to [him] and the [Director, OSP], unlike the Engineering Assessment leak which was a controversial and a highly publicised and politicised affair”. He insists that OCS should have conducted a separate preliminary inquiry into the allegations related to him “to generate a C90A report for the Director General to decide if there was ‘sufficient indication’ of a possible breach [by him]”. He argues that the “supposedly newly discovered allegations against [him] deserved to be examined in a separate investigation”, as he had a right to be investigated individually “and not have his case conflated with allegations against another individual, about another unrelated and highly politicised and public breach”.

22. The foregoing arguments are unfounded. Paragraph 1.7 of Part IX of the Policy on Confidentiality stated that the aim of an investigation was to establish whether there had been a breach of confidentiality or a violation of the handling, protection, dissemination or release procedures for confidential information. Although the investigation was initiated into the publication of the Engineering

Assessment, which was known at the material time, it happened, as it sometimes does, that evidence emerged of other possible breaches of confidentiality. This included evidence which pointed to the complainant's communications on 22 June 2018 and 4 April 2019 to the then Chief of Cabinet and to the Director, OSP, as well as the letter dated 25 March 2019, which the complainant had written to the Director-General detailing information gathered by the fact-finding mission tasked to investigate the alleged use of chemical weapons in Douma. Concerns were raised as to whether the complainant had failed to comply with the specific procedures on confidentiality. There is no rule or principle, which required the initiation of a totally new investigation against the complainant. Moreover, the complainant's submission that his right to due process was violated at the investigative stage is also unfounded. It is obvious that the OPCW had done what was required to satisfy this requirement in paragraph 1.10 of Part IX of the Policy on Confidentiality, which relevantly stated that "[t]he investigation should be conducted on the basis of objectivity and due process" and in paragraph D.1 of the Uniform Guidelines for Investigations. This was achieved by giving the complainant multiple opportunities to be interviewed (see, for example, Judgments 4770, consideration 6, and 4310, consideration 6).

23. However, there was a requirement to observe due process at the disciplinary stage prior to the imposition of any sanction upon the complainant. Notably, Rule 10.2.03 of the OPCW Staff Regulations and Interim Staff Rules, then in force, under the heading "Due process", stated, in effect, that no disciplinary proceedings may be instituted against a staff member unless he or she had been notified of the allegations against him or her, as well as the right to seek assistance in his or her defence, as well as be given a reasonable opportunity to respond to those allegations. These steps were not taken before the Director-General issued the disciplinary measures against the complainant in the letter of 7 February 2020 to the extent that the complainant was not provided with the charges. He was also not provided with a copy of the full investigation report, as was required by paragraph 1.18 of Part IX of the Policy on Confidentiality. The complainant's right to due process before those measures were imposed

upon him was thereby violated. The Appeals Council erred in not so finding and that error was adopted by the Director-General in the impugned decision of 11 April 2022.

24. The violation of the complainant's due process in the disciplinary process was a manifest error, which permits the Tribunal to set aside the impugned decision, as well as the initial decision contained in the letter of 7 February 2020, without it being necessary to rule on any other plea the complainant proffers. Inasmuch as the complainant's rights to due process were violated, he is entitled to moral damages. For this, in the circumstances of this case, the Tribunal will award him 20,000 euros. The OPCW will also be ordered to pay the complainant costs in the amount of 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 11 April 2022 and the initial decision contained in the letter of 7 February 2020 are set aside.
2. The OPCW shall pay the complainant 20,000 euros in moral damages.
3. The OPCW shall also pay the complainant 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 27 October 2025, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 10 February 2026 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

RENÉ M. VARGAS M.