

The Administrative Tribunal,

Considering the second complaint filed by Mr F. M. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 16 March 2004 and corrected on 6 April, the OPCW's reply of 26 May, the complainant's rejoinder of 28 July, and the Organisation's surrejoinder of 18 August 2004;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, an Italian national born in 1966, is a former staff member of the OPCW. He resigned with effect from 31 January 2003.

In a letter dated 18 February 2003 from the Director of Administration the complainant was informed that a review of his presence and movements within the OPCW for the years 2001 and 2002 showed "unaccounted-for absences totalling some 63+ days"; consequently, these days would be treated as annual leave and recovered from his separation benefits. The monetary value of those days was 13,310.97 euros, and after crediting 3,150.22 euros due to him for 14.5 days of unused annual leave, the amount of 10,160.74 euros would be withheld from his repatriation grant. A sum of 6,612.06 euros was paid into his bank account on 6 March as the amount due to him on separation.

On 2 April 2003 the complainant wrote to the Director-General requesting a review of the decision of 18 February, but he was informed on 28 April that the Director-General had rejected his request. He appealed to the Appeals Council on 26 May 2003 against that decision. In his appeal he argued, in particular, that the decision had been taken in breach of due process, that it did not comply with the principle of good faith, and that it was flawed by a misuse of power.

In its report dated 4 December 2003 the Appeals Council considered that there was no basis in any of the Staff Regulations and Interim Staff Rules or pertinent Administrative Directives to justify the action that had been taken regarding the complainant's unauthorised absences, and that it amounted to unequal treatment. It recommended that the decision rejecting his request be reconsidered and that the net monetary value of the days deducted – which it identifies as 10,160.74 euros after crediting 14.5 days annual leave – be paid over to the complainant. In a letter of 30 December 2003 the Officer-in-Charge of the Human Resources Branch informed the complainant, on the Director-General's behalf, that the latter disagreed with the Appeals Council's finding that there was no statutory basis for withholding funds from the complainant's settlement to compensate for the unauthorised absences. However, the letter said the Director-General had agreed to crediting the complainant with the sum of 10,160.74 euros which would otherwise have been withheld from his repatriation grant, and had also expressed his agreement with the Appeals Council that no other compensation was warranted. That is the impugned decision.

On 5 April 2004 the complainant wrote to the Director-General to inform him that he still had not been paid the sum announced in the letter of 30 December 2003. In a letter of 19 May 2004 from the Head of Human Resources the complainant was informed that he would be paid for 14.5 days of accrued annual leave but that the sum of 10,160.74 euros had been credited against his repatriation grant. However, payment of the repatriation grant was subject to his providing proof that he had relocated outside the Netherlands within two years of separation from service.

B. The complainant submits that the impugned decision is illegal because it was vitiated by manifest errors and it failed to comply with the obligation to compensate him fully for the injury he suffered. He reiterates the pleas he put forward in his internal appeal regarding the initial decision taken by the Director of Administration, that is breach of due process of law, breach of the good faith principle and misuse of power. He submits that the Organisation took issue with his working hours spanning a two-year period only after his service had ceased. In its report the Appeals Council had stressed the absence of a legal basis for the Director's actions. However, the

Council failed to draw all the consequences from the illegality of the challenged decision given that it recommended reimbursing him only 10,160.74 euros; it thus committed a manifest error. As the Director-General's final decision rests on the Council's recommendations, it also involves the same manifest error.

He also argues that during the internal appeals procedure he had requested, inter alia, financial compensation for moral injury and costs but the Appeals Council found that such compensation was not due to him. The complainant disagrees. Furthermore, he points out that the Council did not find that he had not suffered a moral injury; it merely considered that such injury should not be compensated.

He seeks the quashing of the impugned decision to the extent that it did not allow his claim. He asks the Tribunal to order the Organisation to pay him 10,160.74 euros plus 3,733.15 euros in respect of the 14.5 days unused annual leave and 3,187.92 euros which had been "withheld from his repatriation grant". He claims compound interest at 8 per cent per annum as from 31 January 2003 on all sums due as well as moral damages and costs for both the internal appeal and this complaint.

C. In its reply the Organisation submits that the impugned decision is not a decision denying payment of an entitlement. In fact, it restored the complainant's right to an entitlement that had previously been withheld. But the complainant has not provided any evidence of relocation which would make him entitled to payment of the repatriation grant. At the time he filed the complaint no decision had been taken not to pay the repatriation grant. There is, therefore, no cause of action and the complaint is irreceivable *ratione materiae*.

The OPCW points out that, as regards his 14.5 days of unused annual leave, the complainant has been informed that he would be paid for them. There is, therefore, no outstanding amount in this respect. In addition, the amount of his repatriation grant, "when it accrues", now remains intact.

It rebuts the complainant's other pleas and refutes his allegations concerning the illegality of the decision of the Director of Administration, saying that his argument of breach of due process is "misconceived and moot"; moreover, that decision is not the one impugned in the complaint. It adds that it is not correct that the issue of the complainant's timekeeping was brought to his notice only after he had left the Organisation. It denies the complainant has suffered any injury.

D. In his rejoinder the complainant notes that, soon after it received his complaint, the OPCW modified its position and informed him in a letter of 19 May 2004 that he would be paid for the 14.5 days of unused annual leave. He expresses his satisfaction that the Organisation has "finally recognised" the illegality of the initial decision taken against him. However, during the period that decision was in effect, he suffered material and moral consequences for which he has not yet been compensated. He argues that he has indeed suffered injury because of a decision that was illegal. He maintains the arguments that he put forward in both his internal appeal and his complaint.

Having regard to the contents of the letter of 19 May 2004, the complainant replaces his claims linked to the repatriation grant with a request that the two-year time limit for claiming that grant be reckoned from the date of the letter. He maintains his other claims.

E. In its surrejoinder the OPCW asks the Tribunal to dismiss the complaint as irreceivable or unfounded in law. It submits that the Director-General reversed the initial decision to charge the 63 days of unauthorised absence against the complainant's final pay because the complainant's supervisors had not diligently enforced the rules during the two-year period at issue – nor had they kept complete and accurate records of his periods of absence. It maintains, however, that the initial decision was not illegal. The complainant had been given repeated warnings about his unauthorised absences. He has now been paid for the 14.5 days of unused annual leave, so his claim in this regard is moot.

The complainant's claim for payment of his repatriation grant is not receivable. He has not yet satisfied the statutory requirements for payment of this entitlement. No decision has been taken to deny payment of this. Thus, he has not exhausted the internal recourse procedures with respect to any alleged non-payment.

In order for his claim to be founded, the complainant must demonstrate that he has become entitled to payment of the grant. Under Staff Regulation 9.4 and Interim Staff Rule 9.4.01 a staff member becomes entitled to the grant only upon documentary evidence being provided to prove relocation outside the Netherlands. However, the OPCW

says the complainant still resides in the metropolitan area of The Hague and he has submitted no evidence to the contrary.

CONSIDERATIONS

1. The complainant was employed by the OPCW from 27 August 1998 until 31 January 2003 when his resignation took effect. However, neither his salary for the month of January nor other separation entitlements were then paid to his bank account. Following an enquiry on 17 February 2003, the complainant was informed by letter dated the following day that a review of his presence and movements had revealed that, during the years 2001 and 2002, he had been absent from work for “63+ days” which would be “treated as annual leave days, rather than as leave without pay”. The letter further informed him that the monetary value of those “63+ days”, namely 13,310.97 euros, would be recovered from his separation benefits; 3,150.22 euros would be offset against unused annual leave and the remaining 10,160.74 euros would be withheld from his repatriation grant.

2. Although the complainant’s salary statement for January 2003 indicated that he would be paid 10,441.92 euros, comprising his monthly salary and unused annual leave, the complainant learned that on 6 March only 6,612.06 euros had been paid into his bank account.

3. On 2 April 2003 the complainant requested the Director-General to review the decision of 18 February to withhold moneys from his separation entitlements. He also sought interest on the moneys withheld, together with compensation for the “legal procedure” which he was compelled to initiate. His request for review was refused on 28 April and on 26 May 2003 he filed an appeal with the OPCW Appeals Council.

4. In his appeal to the Appeals Council, the complainant sought payment of 17,181.52 euros, which he claimed was due to him at his separation from service, together with compound interest at the rate of 8 per cent per annum from 31 January 2003. He also claimed compensation for the moral tort which he claimed to have suffered and the costs of the appeal.

5. Attached to a reply filed by the OPCW before the Appeals Council was a “Time Keeping Study” compiled from the complainant’s signed attendance records and the log records of the Security Office. That study concluded that “507 hours and 26 minutes (equivalent of 63 days, 3 hours 26 minutes) were not accounted for”. However, a footnote to the study stated that “[i]t [might] be relevant to check some absences with [another official] who tasked [the complainant] with a visit to [...] other organizations”.

6. The Appeals Council concluded that the withholding of moneys from the complainant “to compensate for unaccounted-for absences amount[ed] to unequal treatment” and was not “shown to be founded on any internal legislation or established precedent”. It also noted the “acknowledged incompleteness of the time-keeping study” and “the disclaimer [of] its accuracy”. In the result, it recommended that the net monetary value of the days deducted, which it identified as 10,160.74 euros after crediting 14.5 days of annual leave, “be paid over to the [complainant]”. The Appeals Council recommended against paying compensation for moral injury on the ground that the complainant had been notified on 26 June 2002 of the need to work the normal 40-hour week or to submit leave requests for the time not worked. It also recommended against awarding the complainant costs, taking the view that his rights had been adequately recognised by its recommendation.

7. The complainant was informed by letter of 30 December 2003 that the Director-General did not agree with the findings made in the complainant’s favour by the Appeals Council but, nevertheless, he would be credited with the sum of 10,160.74 euros which would otherwise have been withheld from his repatriation grant. It is that decision which is the subject of the complainant’s second complaint by which he maintains the claims made before the Appeals Council and, additionally, seeks compound interest and the costs of the proceedings.

8. On 19 May 2004, some two months after the complaint was filed, the OPCW informed the complainant that he would be paid 3,733.15 euros for the 14.5 days of unused annual leave previously deducted from his final payment and that he would be entitled to the full amount of the repatriation grant only when he provided proof that he had relocated outside the Netherlands. In its reply on the present case the OPCW contended that no repatriation grant had by then become payable and that the complainant had no cause of action in this regard. It also rejected his arguments that the decision to withhold moneys from his separation entitlements involved a denial of due process, was illegal, was taken in bad faith or involved an abuse of power, as claimed in the complaint. It asked that

the complaint be dismissed in its entirety.

9. By his rejoinder the complainant accepts that he was not and is not entitled to payment of a repatriation grant unless and until he relocates outside the Netherlands. Consequently, he seeks, in lieu of his claim for payment of the repatriation grant, that the time for claiming that grant be reckoned from 19 May 2004. In its surrejoinder the OPCW maintains the position taken in its reply and asks that the complaint be dismissed as irreceivable or as unfounded in law.

10. The claim made by the complainant for an extension of time within which to claim payment of the repatriation grant is not receivable. Although his decision to postpone departure from the Netherlands may well have been the result of the decision of the OPCW to deduct moneys from his separation entitlements, the claim for an extension of time was made for the first time before this Tribunal. That being so, there has been no final decision on the matter and, thus, the claim cannot be entertained.

11. So far as concerns the claims for interest, compensation for moral injury and costs, it is convenient to note that the essence of the decision that was challenged before the Appeals Council was to hold the complainant liable for 13,310.97 euros with respect to what were claimed to be unauthorised absences. To the extent that that decision was not reversed and consequential claims were not satisfied at the time of the filing of the complaint, there was a final decision which had been the subject of internal appeal proceedings and there was a subsisting cause of action. The complaint is, to that extent, receivable.

12. Although the OPCW contends otherwise, the decision to hold the complainant liable for what the time-keeping study considered as “unaccounted-for” absences was clearly taken without regard to the requirement of due process. The decision was taken without reference to the complainant and notified to him only after his employment had terminated. No particulars of the unaccounted-for absences were provided until the OPCW filed its reply in the internal appeal proceedings, several months after the complainant had left the Organisation. Thus, he had no proper opportunity to contest the decision, to challenge the accuracy of the time-keeping study, or to account for any of the absences recorded against him.

13. Neither in its reply nor its surrejoinder does the OPCW contest the finding of the Appeals Council that the course of action adopted by it in relation to the complainant amounted to unequal treatment. It does, however, contend that the decision was taken in accordance with paragraph 4 of Annex I to the Staff Regulations, and Interim Staff Rule 5.1.01(b)(ii).

14. Paragraph 4 of Annex I to the Staff Regulations provides:

“No salary shall be paid to staff in respect of periods of unauthorised absence from work unless such absence was caused by reasons beyond their control or duly certified medical reasons.”

Interim Staff Rule 5.1.01(b)(ii) states in part:

“Leave may be taken only when authorised. If a staff member is absent from work without authorisation, payment of salary and allowances shall cease for the period of unauthorised absence.”

15. The provisions of the Staff Regulations and Interim Staff Rules upon which the OPCW relies relate to payment of salary. They do not authorise deductions from separation entitlements. Moreover, an employee whose salary has been paid in full is entitled to assume that it has been accepted that he was present at work as required. At least that is so unless some question is raised within a reasonable time of the claimed absence.

16. Having regard to the failure of the OPCW to give the complainant an opportunity to challenge the accuracy of the time-keeping study or to account for any absence before deciding to withhold moneys from his separation entitlements, it must be concluded that that decision was taken in breach of due process. Having regard to the failure to deduct salary at any time during the two years during which it was later claimed that the complainant was frequently absent from work without authorisation, the failure to provide particulars until well after he had filed his internal appeal, and the failure, in spite of the finding of unequal treatment by the Appeals Council, to assert that the course of action followed in this case was normal practice, it can only be concluded that the decision to withhold moneys from his separation entitlements was taken for reasons of hostility towards the complainant and, thus, was taken in bad faith.

17. To the extent that it has not since been reversed, the decision of the Director-General of 30 December 2003 should be set aside. The complainant is entitled to interest on 3,150.22 euros, representing unused annual leave, at the rate of 8 per cent per annum from 31 January 2003 until 19 May 2004. Given the hardship normally to be expected by a decision to withhold separation entitlements, the OPCW should pay the complainant moral damages in the sum of 2,500 euros. Additionally, it should pay his costs of the proceedings before the Appeals Council in the sum of 1,000 euros and of these proceedings in the sum of 2,000 euros.

DECISION

For the above reasons,

1. The Director-General's decision of 30 December 2003 is set aside in part in accordance with 17, above.
2. The OPCW shall pay the complainant interest on the sum of 3,150.22 euros at the rate of 8 per cent per annum from 31 January 2003 until 19 May 2004.
3. It shall pay him moral damages in the sum of 2,500 euros.
4. It shall also pay the complainant's costs of the proceedings before the OPCW Appeals Council in the sum of 1,000 euros and of these proceedings in the sum of 2,000 euros.
5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 5 November 2004, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet