

**d. O. (No. 2)**

**v.**

**OPCW**

**128th Session**

**Judgment No. 4164**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr S. d. O. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 28 April 2017 and corrected on 26 May, the OPCW's reply of 14 August, the complainant's rejoinder of 29 September 2017 and the OPCW's surrejoinder of 16 January 2018;

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 rejecting his request to reclassify his post.

The complainant joined the OPCW in 2005 as a Finance Clerk at the GS-4 level. On 1 January 2011 he was reassigned to the post of Accounting Clerk, which had previously been classified at the GS-5 level but was reclassified at the GS-4 level in 2010.

On 18 June 2015 the complainant requested that his post of Accounting Clerk be reclassified from GS-4 to GS-5 on the ground that no changes had been made in the duties assigned to the post when it was downgraded in 2010. He also alleged that he had been assigned additional duties at the GS-5 level in 2012 and 2014 and that a report

by an external consultant issued in April 2013 had confirmed anomalies regarding the level of the duties carried out by him and had recommended that the classification of his post be reviewed.

The complainant's supervisor transmitted his request to the Director of the Division (the Director of Administration) by a memorandum of 21 July 2015, expressing the view that the complainant's request did not meet the conditions required for reclassification set out in the Administrative Directive on Procedures for Promotion through Reclassification (AD/PER/35). The complainant objected to this in a letter of 30 July and provided his Division Director with a detailed response to his supervisor's assessment.

On 23 September 2015 the Director of Administration rejected the complainant's request for reclassification on the ground that the duties and tasks assigned to him did not substantially deviate from his job description. He explained that the complainant's post had been reviewed and reclassified at GS-4 by an independent classification specialist on 15 June 2010 prior to the complainant's reassignment.

On 16 November 2015 the complainant asked to be provided with a copy of the classification specialist's report. He was informed on 20 November that his request could not be granted, because it was not the practice of the Organisation to share this information with staff members, particularly in a situation where the reclassification process was conducted prior to the complainant's reassignment to the post.

On 20 November 2015 the complainant requested that the Director-General review the decision not to reclassify his post, that an external classification specialist verify the correct classification of his post and that any reclassification of his post be applied retroactively to the date when he commenced the additional functions which, in his view, justified the reclassification. His request for review was rejected on 10 December 2015.

On 14 January 2016 the complainant lodged an appeal against the decision of 10 December 2015. In its report of 18 January 2017 the Appeals Council unanimously recommended that the appeal be rejected as unfounded. It also found that, in light of the decision to reclassify the post from GS-5 to GS-4 taken by the Executive Council during

its 62<sup>nd</sup> Session in October 2010, the complainant's request for a reassessment of the classification of the post was "not justiciable".

By a decision of 1 February 2017, the Director-General decided to follow the Appeals Council's recommendation to dismiss the appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the OPCW to appoint an external classification specialist to assess the classification of his post. In the event that his post is found to be at GS-5 level, he asks the Tribunal to order that the OPCW pay him the additional salary, emoluments, pension rights and any other benefit applicable to GS-5 posts retroactively as from the date he carried out the additional functions. He claims moral damages, as well as costs, with interest on all sums awarded.

The OPCW requests the Tribunal to dismiss the complaint as entirely unfounded.

#### CONSIDERATIONS

1. The complainant impugns the decision issued by the Director-General on 1 February 2017. That decision confirmed the original decision of 23 September 2015 by the Director of Administration, as well as the Director-General's prior decision of 10 December 2015, to reject the complainant's request that his post of Accounting Clerk at the GS-4 level be reclassified. That post was previously a GS-5 level post but in 2010 it was reclassified at the GS-4 level with effect from 24 June 2010. The complainant, who assumed it on 1 January 2011, contends that the decision rejecting his request to reclassify the post at the GS-5 level is in error for a number of reasons.

2. Staff Regulation 2 was the basic authority under which the downgrading of the subject post was undertaken in 2010. It required the Director-General to prepare and submit to the Executive Council, for its consideration and approval, proposals for the classification of posts according to the nature of the duties and responsibilities required, in conformity with principles laid down by the Conference of the States

Parties, with due regard to the Programme of Work and Budget and the OPCW Financial Regulations and Rules, and taking into consideration the master standards of job classification as developed by the International Civil Service Commission (ICSC).

3. Pursuant to Staff Regulation 2, Administrative Directive AD/PER/35 (hereinafter “the Directive”), which the Director-General issued on 31 January 2005, provides procedures that are to be followed for the promotion of staff members through the reclassification of the posts which they hold. A detailed reproduction of paragraphs 3, 4, 6 and 7 of the Directive, which fall under the rubric “Request for post reclassification”, as relevant, will provide a helpful regulatory perspective for this case.

- “3. [...] Request for the reclassification of a post shall be made by the Director of Division or Office in the following cases:
  - a. When the duties and responsibilities of the post have changed substantially as a result of restructuring within an office and/or an Executive Council decision; and/or
  - b. When a substantive change in the functions of a post occurred since the previous classification.
4. Incumbents who consider that the duties and responsibilities of their posts have substantially changed may bring this issue to their supervisor(s) and request a review of the classification level who shall then bring it to the attention of the Director of the Division to decide whether further action is required.
5. [...]
6. Requests for reclassification of posts shall be submitted by the relevant Director to the Director-General through the Head of Human Resources Branch who will take appropriate action to have the post reviewed independently by a classification specialist in accordance with the relevant classification standards established by the International Civil Service Commission (ICSC).
7. Requests for reclassification shall include:
  - a. A complete and up-to-date job description for the post in question certified and approved by the direct supervisor and Division Director,

- b. An up-to-date organisational chart showing the placement of the post in question and of other posts within the Branch or Division, describing the post number, group and level of each post and clearly outlining all reporting relationships,
- c. A valid and available post number confirming the existence of a post approved at the appropriate level in the budget, unless the request is submitted for advice (but not decision) prior to a budget submission.”

Paragraph 4 of the Directive is applicable to this case.

4. It will also be recalled that the basic guiding principles where the classification of a post is at issue were stated as follows in Judgment 3589, consideration 4:

“It is well established that the grounds for reviewing the classification of a post are limited and ordinarily a classification decision would only be set aside if it was taken without authority, had been made in breach of the rules of form or procedure, was based on an error of fact or law, was made having overlooked an essential fact, was tainted with abuse of authority or if a truly mistaken conclusion had been drawn from the facts (see, for example, Judgments 1647, consideration 7, and 1067, consideration 2). This is because the classification of posts involves the exercise of value judgements as to the nature and extent of the duties and responsibilities of the posts and it is not the Tribunal’s role to undertake this process of evaluation (see, for example, Judgment 3294, consideration 8). The grading of posts is a matter within the discretion of the executive head of the organisation (or the person acting on her or his behalf) (see, for example, Judgment 3082, consideration 20).”

5. In rejecting the complainant’s reclassification request in the impugned decision, the Director-General accepted the unanimous recommendation of the Appeals Council and relevantly set out the reasons for the decision as follows:

“The Appeals Council, in its unanimous report, decided to make the following recommendations to the Director-General in relation to your Appeal:

- 1. The Appeals Council was of the opinion that the Administrative Directive on Procedures for Promotion through Reclassification (AD/PER/35, dated 31 January 2005) – as well as other relevant internal rules, regulations and directives – had been respected (paragraph 4.1).

2. The Appeals Council did not consider the request to reassess the classification of your post – taken *via* decision of the policy-making organs of the OPCW at EC-62 – to be justiciable (paragraph 4.2).
3. The Appeals Council was of the view that the decision to deny your request for reclassification was made in accordance with the facts (paragraph 4.3).

In its conclusion the Appeals Council therefore recommended that the Director-General dismiss your Appeal (paragraph 4.4).

For the reasons given by the Appeals Council, as well as for the other reasons set forth in the Organisation’s Response, dated 12 April 2016, the Director-General has decided to maintain his decision to reject your request for review.”

6. In his request for reclassification of 18 June 2015, the complainant stated that when he sought the transfer to the vacant GS-5 post in 2010 it was downgraded to the GS-4 level for budgetary reasons. According to him, the explanation for downgrading the post was simply that a review was made during the budget planning process and it was determined that the responsibilities of the post were more appropriate at the lower grade, but that there was no change in the duties that attached to the previous GS-5 post when it was downgraded to the GS-4 level. This however overlooks the statement in the Director-General’s Note of 23 September 2010 to the Executive Council that its approval was sought for the reclassification of eight posts for which revised job descriptions had been prepared in 2010 as recommended by an external classification specialist in accordance with ICSC standards, as the Directive required. The complainant further justified his request by reference to a recommendation which an external consultant made in a report of 5 April 2013.

7. In accordance with paragraph 4 of the Directive, the complainant’s supervisor brought his request for reclassification to the attention of the Director of the Division by a memorandum of 21 July 2015 in order for the Director of the Division to decide whether further action was required. However, in doing so he provided an assessment of the tasks and responsibilities included in the job description for the complainant’s post as well as further details regarding the tasks which

the complainant then performed. The complainant objected to this in a communication dated 30 July 2015 to the Director of the Division. He contended, first, that paragraph 4 of the Directive simply required his supervisor to bring his request to the Director of the Division who was then to decide whether further action was required on the request. Secondly, that his supervisor's assessment was flawed because it included information which was both factually incorrect and irrelevant to his request for reclassification. Third, that it seemed that his supervisor's approach was dedicated to verifying whether or not he was carrying out all the tasks in the job description and relied on the fact that there were some tasks in it which he had only recently started to perform. The complainant insisted that this was irrelevant since he (the complainant) had no control over the tasks which his supervisor required him to perform at any particular time. In his view, what mattered was whether he was performing tasks that were additional to those which were in the job description for the post. The complainant provided his Division Director with a detailed response to his supervisor's assessment. Among other things, he set out tasks that he had done which, in his view, were not in his job description.

8. The subsequent letter in which the Director of the Division (the Director of Administration) rejected the complainant's request to reclassify his post referred to the supervisor's memorandum of 21 July 2015 in which the supervisor assessed the complainant's request; the complainant's rebuttal of that assessment, as well as the fact that he (the Director) had invited the complainant to some three meetings to discuss the request. This, according to the Director, was to give the complainant the opportunity to express his views on the request as well as for him (the Director) to obtain as much information as possible to make a decision on the request taking a holistic approach in determining whether the duties of the subject post had substantially changed. The Director concluded that "[h]aving thoroughly reviewed your request, I am of the view that your assigned tasks do not substantially deviate from your GS-4 job description [and accordingly] no further action on your request is required".

9. The complainant argues that by sending the memorandum of 21 July 2015 in which he assessed the request for reclassification, his supervisor acted without legal basis and improperly influenced the Director of Administration in breach of the Directive. He further contends that it was not the Division Director's role to determine whether changes in functions of the post warranted reclassification, as that is the role of the classification specialist.

The decision that the Director made did not supplant the role of the classification specialist referred to in paragraph 6 of the Directive, as the complainant argues. The Division Director did not carry out an assessment of the grading of the post. He made a factual determination as to whether the functions of the post had substantially changed since its last classification in 2010. The complainant further argues that the decision of 23 September 2015 does not apply the correct legal standard set out in the Directive. However, in the Tribunal's assessment it did.

10. The Tribunal is satisfied that the Director of the Division carried out his mandate under paragraph 4 of the Directive. He first sought to determine whether there was a substantial change in the functions of the subject post from the functions that attached to it under the previous job classification prior to submitting the request to the Director-General pursuant to paragraph 6 of the Directive. Contrary to the complainant's contention, it is implicit in the requirement in paragraph 4 of the Directive that the staff member, who brings the issue to the supervisor and requests a review of the classification level when he/she considers that the duties and responsibilities of the post have substantially changed, bears the burden of providing the evidential basis for this consideration. It was for this reason that the complainant submitted his request explaining why his post warranted reclassification together with the supporting documents which paragraph 7 of the Directive required him to provide. However, the foregoing did not relieve the Organisation of its obligation to ensure that all posts are correctly classified.

Contrary to the complainant's contention, paragraph 4 of the Directive did not make his supervisor the mere conduit via whom the request was to be transmitted to the Director. There is no provision or principle that prevented his supervisor from providing an informed



opinion to assist the Director in carrying out the mandate in paragraph 4 of the Directive. Critically, however, the Director had to retain the discretion to determine whether a substantial change in the functions of the post had occurred since the previous classification. It is clear from his communication of 23 September 2015 that he did so and fairly explained the reasons for his decision that the functions of the post had not substantially changed to warrant sending the request to the Director-General pursuant to paragraph 6 of the Directive. On that explanation the Tribunal does not accept the complainant's contention that the Director's decision merely stated that he was "of the view" that the tasks assigned did not deviate from those of the complainant's GS-4 job description. Moreover, the Tribunal finds no vitiating factual errors that were made in relation to the scope of the complainant's duties and responsibilities, as he contends.

11. The complainant further contends that the decision of 23 September 2015 was insufficiently reasoned, as was the Appeals Council's report, with the result that the impugned decision, which simply endorsed the flawed findings and recommendations in the Appeals Council's report, is tainted and should be set aside. This plea is unfounded. It is well established by the case law that the reasons for a decision must be sufficiently explicit to enable the staff member concerned to take an informed decision accordingly; that they must also enable the competent review bodies to determine whether the decision is lawful and the Tribunal to exercise its power of review, and that how extensive those reasons need be will depend on the circumstances (see, for example, Judgment 3772, under 10).

12. The Tribunal finds that in his decision of 23 September 2015 the Division Director provided detailed reasons for his conclusion that the duties and responsibilities of the complainant's post had not substantially changed. Those reasons were sufficient to permit the complainant to take an informed decision and to enable the competent review bodies, including the Tribunal, to determine whether the decision was lawful. It is accordingly determined that the report of the Appeals Council and the impugned decision were not unlawful on account of the fact that they endorsed the Director's decision.

13. Moreover, neither the Appeals Council's report nor the impugned decision are vitiated because they referred to prior submissions and because the latter basically accepted the recommendations of the Appeals Council, as the complainant contends. The Tribunal has consistently stated that when the executive head of an organisation adopts the recommendations of an internal appeal body, she or he is under no obligation to give any further reasons in her or his decision than those given by the appeal body itself. The following was stated in Judgment 3184, consideration 10:

“The case law has consistently provided that ‘[t]here is a duty to explain a decision or a conclusion because everyone concerned has to know the reasons for it [...] [b]ut the duty will be discharged even if the reasons are stated in some other text to which there is express or even implied reference, for example where a higher authority endorses the reasoning of a lower one or a recommendation by some advisory body’ (see in particular Judgment 1673, under 6). Consequently, the Director-General, in his final decision, was not required to provide a detailed reply to each of the objections raised by the complainant. He merely had to state reasons for adopting or rejecting the recommendation of the advisory body and the reason on which the original decision was based.”

14. The complainant contends that the Organisation should have given him a copy of the independent classification specialist's report of June 2010 even though the reclassification process had been conducted prior to his reassignment to the subject post. He states that he is not challenging the classification made in 2010, but that the report which led to the classification is directly relevant to his case. This plea is unfounded. The Directive requires that the consideration as to whether a post should be reclassified commence with a consideration of the current job description for the post, which is to be compared with the present duties and responsibilities of the post to determine whether they have changed substantially since the last classification. That report was made prior to the complainant's assumption of the subject post. The report of the classification specialist which formed the basis of the complainant's job description, bears no relevance to his 2015 request for reclassification. This plea is therefore unfounded.

15. The complainant contends that the Appeals Council erred when it considered that the classification of his post made by the Executive Council in 2010 was “not justiciable”. He states that that decision was simply a budgetary decision which did not bind the Director-General on an individual request for reclassification. The Tribunal holds that since the complainant assumed the subject post after the Executive Council had approved its reclassification in 2010, the Executive Council’s decision was not challengeable by the complainant in 2015 in the context of his challenge to the decision to reject his request for the reclassification of his post. The plea therefore fails.

16. In the foregoing premises the complaint is unfounded and will be dismissed.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 17 May 2019, 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 3 July 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

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