

The Administrative Tribunal,

Considering the third complaint filed by Mr H.W. S. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 28 June 2006, the OPCW's reply of 20 October 2006, the complainant's rejoinder of 25 January 2007 and the Organisation's surrejoinder of 16 March 2007;

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. Facts relevant to this case are to be found in Judgment 2660, also delivered this day. Suffice it to recall that, having been notified of the decision not to extend his contract beyond its expiry date of 14 August 2005, the complainant informed the Director-General, in a letter dated 25 February 2005, that he intended "to contest the termination [of his contract] by administrative means". In that letter, he also stated that he had "already filed a complaint in Washington concerning [his] treatment at the hands of the [United States] Delegation to the OPCW, and their interference in [his] professional affairs, including efforts to force [his] early departure from the Organisation", and that he intended to make this matter public.

On 14 March 2005 the Director-General placed him on special leave with full pay. In a memorandum of that same date, which he handed to the complainant, he explained that this measure had been taken pursuant to Interim Staff Rule 5.3.01(a), in order to protect the interests of the Organisation and to attenuate the adverse effects of the complainant's action in filing a complaint against the delegation of a Member State relating to the exercise of his functions at the OPCW. He stated that this action demonstrated a clear lack of judgement on the complainant's part which was "manifestly detrimental to the interest of the Organisation". He instructed the complainant to withdraw within seven days the complaint that he had filed in Washington, and to turn over immediately all aspects of his functions as Director of Administration to a colleague.

By a letter of 2 May 2005 the complainant asked the Director-General to review the decision to place him on special leave. He argued that the decision in fact amounted to a disciplinary measure and that, as such, it could not be based on Interim Staff Rule 5.3.01(a). Moreover, in applying that disciplinary measure, the Director-General had not complied with the requirements of due process. The complainant stated that no "official complaint" had been filed by him, and that the Director-General's decision was based on a misunderstanding of the facts. He therefore considered that the decision to place him on special leave violated the principle of proportionality.

On 26 May the Deputy Director-General wrote to inform the complainant that the Director-General had decided to confirm the decision to place him on special leave. He emphasised that this decision did not constitute a disciplinary measure. Although the Director-General considered that he did have a sufficient legal basis to take disciplinary action, he had decided not to do so in the interest of the Organisation. The complainant could not argue that his defence rights had been violated, since it was he himself who had chosen to inform the Director-General of the actions which the latter viewed as amounting to unsatisfactory conduct. Under those circumstances, the need for due process did not arise. As for the allegation that the principle of proportionality had been breached, this was based on the false premise that a disciplinary measure had been imposed.

The complainant filed an appeal with the Appeals Council on 24 June 2005. In the course of the written proceedings the Organisation objected to the fact that a rejoinder had been filed on the complainant's behalf by a professional lawyer, in breach of Interim Staff Rule 11.2.03(h), and invited the Appeals Council to treat it as being irreceivable. In its report dated 23 March 2006 the Council recommended that the appeal be dismissed on its merits. It took the view that the Director-General was under no obligation to take disciplinary action against staff members whose conduct was deemed unsatisfactory and that he was entitled to take other administrative measures to deal with such situations. The Council drew attention to the fact that it was the complainant who had stated quite clearly

that he had filed a complaint in Washington, and that despite the reaction that this declaration had prompted on the part of the OPCW, he had made no effort to clarify the matter until he submitted his request for review. The Council found that the decision to place the complainant on special leave had not been taken as a disciplinary measure, and that there was no evidence that it had violated the complainant's dignity or rights.

By a letter of 5 April 2006 the Director-General informed the complainant that he considered his appeal to be irreceivable, but that he had decided to dismiss it on its merits in accordance with the recommendation of the Appeals Council. That is the impugned decision.

B. The complainant contends that, according to Interim Staff Rule 5.3.01(a), special leave can be imposed on a staff member by the Director-General only in exceptional circumstances and in the interest of the Organisation. In his view, this rule applies only to cases which are not covered by another provision of the Interim Staff Rules. Referring to the Director-General's memorandum of 14 March 2005, he points out that he was accused in particular of having failed to "regulate [his] conduct with the interests of the Organisation only in view", of having acted disloyally and of having breached his obligation to "refrain from any action that might reflect on [his] position as an international officer of the OPCW". All of these reasons amount to infringements of his professional obligations, and as such they ought to have given rise to disciplinary proceedings in accordance with Interim Staff Rule 10.2.01. Consequently, he argues, the decision to place him on special leave could not be based on Interim Staff Rule 5.3.01(a), and his special leave must be understood as a disciplinary sanction imposed in breach of the applicable rules. According to the complainant, when confronted with the misconduct of a staff member, the Director-General cannot choose between initiating disciplinary proceedings and resorting to special leave under Rule 5.3.01(a).

The complainant also contends that, since the decision to place him on special leave was really a disciplinary measure, he ought to have been afforded due process, in accordance with Interim Staff Rule 10.2.034. In this case, however, the Director-General's decision took effect immediately and he was given no opportunity to respond or to defend himself. Indeed, he was forced to leave the premises at once, as if he had been found guilty of a crime. Nor was he able to refer his case to the Joint Disciplinary Committee.

He considers that the decision to place him on special leave is "illegal for erroneous motivation", insofar as the conditions stipulated in Interim Staff Rule 5.3.01(a), namely that "exceptional circumstances" should exist and that the decision should serve the interest of the Organisation, are not satisfied. He also asserts that it violates the principle of proportionality and that it amounts to misuse of power on the part of the Director-General.

The complainant asks the Tribunal to set aside the Director-General's decision of 14 March 2005 and to award him 250,000 euros in compensation for moral prejudice. He also claims costs.

C. In its reply the OPCW submits that the Appeals Council was wrong to accept the rejoinder submitted to it by the complainant's lawyer, in breach of Interim Staff Rule 11.2.03(h). In Judgment 775 the Tribunal held that "[i]f an internal appeal was time-barred and the internal appeals body was wrong to hear it, the Tribunal will not entertain a complaint challenging the decision taken on a recommendation by that body". The Organisation considers that this precedent should also apply in cases where an internal appeal was irreceivable for other reasons, and it invites the Tribunal to dismiss the complaint accordingly. It also argues that the complainant's claim for compensation for moral prejudice is irreceivable. This claim did not appear in the appeal as filed, but was presented for the first time in the complainant's rejoinder before the Appeals Council, after the expiry of the one-month period for challenging the decision of 26 May 2005. The Organisation therefore considers that the claim was irreceivable *ratione temporis* before the Appeals Council and that, in accordance with Judgment 468, it should be irreceivable before the Tribunal, particularly since it has been increased from 200,000 to 250,000 euros. It adds that this claim was also irreceivable before the Appeals Council because it was presented by the complainant's lawyer, who was not allowed to represent him in those proceedings.

On the merits the Organisation submits that the complainant has misinterpreted Interim Staff Rule 5.3.01(a). It asserts that the decision to place the complainant on special leave was not a disciplinary measure, even though his conduct was plainly unsatisfactory. The wording of Staff Regulation 10.2 makes it clear that the Director-General is under no obligation to apply disciplinary measures against a staff member whose conduct is deemed unsatisfactory. In this case, the complainant had recently been informed that his contract would not be extended. Under the circumstances, the Director-General decided, "for humanitarian reasons and in the interest of the Organisation", not to impose disciplinary measures.

The OPCW argues that, since no disciplinary measure was taken, the complainant's allegation that his defence rights were violated is unfounded. For the same reason, it considers that the principle of proportionality is not relevant to this case. It submits that the Director-General's decision was fully justified and properly motivated and that the complainant has produced no evidence to support his allegation of misuse of power. Lastly, the Organisation emphasises that the complainant was at all times treated with courtesy and respect and with due regard for his dignity.

D. In his rejoinder the complainant submits that, since it would no longer be possible to implement a decision cancelling his special leave, the only way to "reestablish [him] in his rights" is to award him compensation. Consequently, his claim for compensation is receivable. He presses his pleas on both the receivability and the merits of his complaint.

E. In its surrejoinder the OPCW refers to Judgment 995 to support the contention that the complainant's failure to comply with the procedural rules governing his internal appeal renders his complaint irreceivable. It maintains its position on the merits.

CONSIDERATIONS

1. In Judgment 2660, also delivered this day, the Tribunal ruled on the complainant's first and second complaints, which concern the decision not to extend his fixed-term appointment. Shortly after being notified of that decision, the complainant was placed on special leave until the expiry of his contract. In his third complaint he challenges the rejection by the Director-General of his appeal against the decision to place him on special leave.

2. Reiterating an argument raised in its replies to the first and second complaints, the Organisation contends that the complainant's rejoinder to the Appeals Council was submitted by a professional lawyer in violation of Interim Staff Rule 11.2.03(h) and the Provisional Rules of Procedure of the Appeals Council and was thus not receivable before the Appeals Council.

3. As stated in Judgment 2660, while the Tribunal agrees that the Council erred in accepting the rejoinder, this error is of no practical consequence given that all of the documents and information necessary to understand the appeal were included at the time the appeal was filed.

4. The complainant advances five arguments: the decision to place him on special leave does not comply with the requirements of Interim Staff Rule 5.3.01(a), violates his defence rights, is not supported by adequate reasons, violates the principle of proportionality and constitutes a misuse of power.

5. Staff Regulation 5.3 provides the authority for granting special leave. It reads:

"Special leave may be authorised by the Director-General in exceptional cases, and normally without pay, in accordance with the Staff Rules."

Interim Staff Rule 5.3.01(a) provides:

"Special leave may be granted, normally without pay, for advanced study or research in the interest of the Organisation, in cases of extended illness, for child care, or for other important reasons for such period and on such conditions as the Director-General may determine in an Administrative Directive in accordance with the relevant United Nations rules. In exceptional cases, the Director-General may, at his or her own initiative, place a staff member on special leave with partial or full pay if he or she considers such leave to be in the interest of the Organisation."

6. According to the complainant, the fact that special leave can be imposed only in exceptional cases implies that it cannot be imposed in circumstances that are covered by another provision of the Interim Staff Rules. However, he does not offer any authority for this view, nor is the Tribunal aware of any rule of statutory interpretation that would support it.

7. The complainant states that he never filed a complaint with a MemberState. From the available evidence, it appears that he either did complain, or at least led the Director-General to believe that he had complained and that

he was intending to complain further. In his letter of 25 February 2005 he stated that he had “already filed a complaint in Washington concerning [his] treatment at the hands of the US delegation to the OPCW”. He then threatened to do further damage by stating that it was his “intention to make this matter both public and transparent to any interested parties, who have a legitimate interest in how the OPCW is being managed”. As the Appeals Council noted, the language of the letter indicates that he had already taken some action and intended to do more. It should also be noted that it was only when the complainant filed his request for review that he denied having lodged a complaint and indicated that he had in fact merely discussed the matter with former colleagues.

8. For the purpose of this complaint, it is immaterial whether the complainant did or did not complain to a MemberState. The fact is, he led the Director-General to believe that he had complained to outsiders and intended to take further public action.

9. The Organisation submits that by putting the complainant on special leave it did not take a disciplinary measure. It argues that the Director-General was protecting a legitimate interest of the Organisation to remain on good terms with its Member States and was acting proportionally.

10. The defendant acknowledges, as it did in its submissions to the Appeals Council, that the Director-General took the view that there was a sufficient legal basis to take disciplinary measures; however, he decided not to do so in the interest of the Organisation and for “humanitarian” reasons. It argues that in these circumstances the Director-General was under no obligation to apply disciplinary measures. Further, it asserts that if a decision is made not to impose any disciplinary measures, the Director-General may nevertheless take administrative action in the interest of the Organisation.

11. The Organisation maintains that special leave was imposed instead of disciplinary sanctions because the latter are harsher, and that in light of the fact that the complainant had been notified that his contract would not be extended shortly beforehand, it was a compassionate decision to only apply special leave.

12. The Organisation also submits that, to support an allegation of misuse of authority, a staff member must adduce evidence that the decision was taken for an improper purpose, but the complainant has not done so.

13. Lastly, the Organisation relies on Judgment 809 as authority for the proposition that the use of special leave has to be reasonable, though it need not be the only reasonable way to solve a situation.

14. The complainant contends that in this case the imposition of the special leave was really a disguised disciplinary sanction for misconduct. He maintains that the Director-General ought to have initiated disciplinary proceedings so that he would have been afforded the protection of due process. He disputes the Organisation’s submission that the Director-General had the option of pursuing disciplinary or administrative action.

15. In Judgment 809 the Tribunal held that, in order to justify the imposition of special leave, the Organisation must show “that use was not made of the special leave for any purpose extraneous to the Organization’s interests and that the arrangement was a reasonable though not necessarily the only reasonable way out of the dilemma”. However, it must be noted that this statement was made in a context where a staff member had been required to take special leave until a new post was found. As well, the wording of the relevant provision in that case differs significantly from that of Interim Staff Rule 5.3.01(a).

16. While in principle, on the facts of the present case, the Tribunal agrees with the Appeals Council’s finding that, having regard to the wording of the provision, the Director-General had the discretion to take either disciplinary measures or other administrative action, it is evident from the Organisation’s characterisation of its own actions that the imposition of the special leave was disciplinary in nature. In these circumstances, the special leave was imposed without affording the complainant the safeguards attached to disciplinary proceedings. Consequently, he is entitled to compensation.

17. As the Tribunal has dismissed the complainant’s first and second complaints concerning the decision not to extend his fixed-term contract in Judgment 2660 on grounds unrelated to the present matter and the special leave has now expired, the decision of 14 March 2005 to place the complainant on special leave has lapsed. Accordingly, his claim to set aside that decision is without object.

18. The Organisation submits that the complainant is not entitled to moral damages since he did not request any specific relief in his statement of appeal. In particular, he did not ask the Appeals Council to make an award for

any material or moral prejudice. His claim for moral damages was entered for the first time in the rejoinder submitted to the Appeals Council, which the Organisation correctly contends should not have been received. The submissions overlook the fact that a clear claim for moral damages was made in the complainant's letter of 2 May 2005 requesting a review of the decision to place him on special leave, which was annexed to his statement of appeal.

19. The Tribunal awards the complainant moral damages, which it sets at 5,000 euros, and costs in the amount of 2,500 euros.

DECISION

For the above reasons,

1. The Organisation shall pay the complainant compensation in the amount of 5,000 euros.
2. It shall also pay him 2,500 euros in costs.

In witness of this judgment, adopted on 9 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet