V. (No. 6)

v.

OPCW

124th Session **Judgment No. 3853**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr R. G.M. V. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 18 December 2013 and corrected on 26 March 2014, the OPCW's reply of 22 July, the complainant's rejoinder of 3 October 2014 and the OPCW's surrejoinder of 8 January 2015;

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 to terminate his contract on the grounds of unsatisfactory service.

Facts relevant to this case are set out in Judgment 3235, delivered in public on 4 July 2013, concerning the complainant's first complaint, and Judgment 3731, delivered in public on 8 February 2017, concerning the complainant's fifth complaint. Suffice it to recall that by a letter of 20 October 2009 the complainant was notified of the Director-General's decision to terminate his contract on the grounds that his services had proved unsatisfactory. Following an internal appeal in which he challenged inter alia the decision to terminate his contract, by a letter of

19 November 2010 he was informed that the Director-General reconfirmed that decision.

The complainant impugned the decision of 19 November 2010 in his first complaint before the Tribunal. In Judgment 3235 the Tribunal set aside that decision, remitted the matter to the OPCW for further consideration, awarded the complainant moral damages and costs and dismissed his remaining claims.

After the delivery of Judgment 3235 the parties entered into settlement negotiations, which were unsuccessful. By a letter of 1 October 2013 the complainant was notified that, following a review of the decision of 19 November 2010 and the reasons for that decision, the Director-General had decided that the complainant's failure to report to work upon the exhaustion of his statutory sick leave entitlements followed by a period of special leave with full pay remained a valid basis for the termination of his contract. Furthermore, the damages awarded by the Tribunal in Judgment 3235 constituted an adequate remedy for the prejudice he had suffered as a result of the OPCW's earlier failure to provide him with valid reasons for the decision of 19 November 2010. That is the impugned decision.

In response to a query by the complainant, by a letter of 3 December 2013 he was informed by the Administration that, as a former staff member, he did not have a right to lodge an internal appeal against an administrative decision and he was thus invited to bring his concerns regarding the decision of 1 October 2013 directly to the Tribunal.

The complainant asks the Tribunal to set aside the impugned decision. He seeks reinstatement and the payment of all salaries, benefits and emoluments, from the date of his separation from service to the date of his reinstatement, with interest from the due dates. He claims moral damages in the amount of 30,000 euros, material and exemplary damages, and costs for legal assistance. He further requests the Tribunal to award other appropriate relief as it deems just and proper.

The OPCW asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. On 4 July 2013 the Tribunal delivered in public Judgment 3235 dealing with a complaint filed by the complainant on 2 February 2011. In those proceedings the complainant impugned a decision of the Director-General of 19 November 2010. By that decision, the Director-General confirmed a decision of 20 October 2009 to terminate the complainant's contract.

2. In Judgment 3235 the Tribunal explained that the Director-General had not indicated whether he had considered and acted on a recommendation of the Appeals Council in its report of 21 October 2010 to re-examine the grounds of the termination of the complainant's contract in light of information provided by Dr R. in an e-mail of 15 October 2010. The Director-General's failure to provide adequate reasons on this important matter provided the legal foundation for the order setting aside the impugned decision. The orders actually made by the Tribunal were:

> "1. The decision of the Director-General of 19 November 2010 is set aside.
> 2. The matter is remitted to the OPCW for further consideration.
> 3. The OPCW shall pay the complainant moral damages in the amount of 8,000 euros.
> 4. It shall also pay him costs in the amount of 3,500 euros.
> 5. All other claims are dismissed."

3. In an application filed on 21 November 2013 the complainant sought the interpretation and execution of Judgment 3235. That application was dealt with in Judgment 3731.

4. In the present complaint the complainant impugns a decision of the Director-General to, in substance, affirm the decision to terminate his contract. This decision was communicated to the complainant by a letter dated 1 October 2013. It was a decision intended to remedy the deficiencies in the Director-General's decision-making identified in Judgment 3235.

5. In Judgment 3235, considerations 2 through 12, the Tribunal said the following:

> "2. The events leading directly to the impugned decision began with the complainant commencing a lengthy period of sick leave on 12 March 2007. He was then mentally unwell. The OPCW has not contested at any point the complainant's right to take sick leave at the time. Indeed Dr R., the Senior Medical Officer of the OPCW's Health and the Safety Branch, actively supported the complainant being provided psychological and psychiatric support while on this leave. Dr R. was one of the complainant's treating doctors and had at least eight lengthy consultations with the complainant between March 2007 and February 2008. By 13 December 2007 the complainant had exhausted his entitlement to sick leave on full pay and by 5 August 2008 had exhausted all entitlements to sick leave. However as a humanitarian gesture, the OPCW placed him on special leave with full pay with retroactive effect from 6 August 2008 pending the outcome of the arbitration of an issue that had earlier risen between the Organisation and the insurance broker responsible for the day-to-day administration of its Group Insurance Contract.
>
> 3. The OPCW had taken out two insurance policies for the benefit of its staff which provided benefits to insured persons in the case of, inter alia, non service-incurred disability or service-incurred disability respectively. The issue with the insurance broker arose as a result of the complainant's request of 18 February 2008 that the provision of one of the insurance policies be invoked on the basis that his illness be recognised as a non service-incurred permanent total disability, which could have led to the payment of a permanent disability benefit of three times the complainant's annual pensionable salary. The applicable policy provided benefits in the case of the death, permanent physical disability resulting from an accident, temporary incapacity or permanent total disability of an insured staff member of the OPCW insofar as the death or permanent physical disability was not covered by the OPCW's Rules and Regulations with respect to service-incurred risks.
>
> 4. The service-incurred policy provided benefits in case of death, permanent disability and temporary incapacity of an insured OPCW staff member attributable to the performance of official duties. These benefits aligned with the right of staff members under Staff Rule 6.2.03 to compensation in any of these last-mentioned circumstances.
>
> 5. The complainant's request was supported by Dr R. who wrote to the insurance broker on 20 February 2008 expressing the conclusion that the complainant was 'totally and permanently incapacitated for further work with OPCW'. The complainant was subsequently examined on 4 June 2008 by Dr V.d.B., at the request of the insurance broker, but Dr V.d.B. did not share Dr R.'s opinion about the complainant's incapacity. In his report Dr V.d.B.

concluded the complainant was 'not 100% disabled (he would be for less than 33% though)' and also expressed the opinion that the complainant 'would be able to perform his own or other duties within the OPCW or with another employer if the recommendations made in Conclusion 1 are followed up'. After noting that the complainant's recovery was held back by social interaction problems with some staff at work, Dr V.d.B. had recommended in Conclusion 1 that 'arrangements [should be] made about internal communication and social interaction (rules of conduct). A counselling session (mediation) [could] also make a positive contribution in this respect.'

6. This conclusion was not accepted by the Organisation. On 12 September 2008 the Director of Administration wrote to the insurance broker reiterating the view that the complainant was totally and permanently disabled (for the purposes of the policy). This letter appended a letter of the same date from Dr R. who challenged, in detail, a number of Dr V.d.B.'s conclusions.

7. This ongoing disagreement between the OPCW and the insurance broker led to the appointment of an arbitrator pursuant to the insurance policy. The agreement to appoint the arbitrator, the Arbitration Compromise dated 20 February 2009, was expressed to be between the complainant and the OPCW of the one part and the insurance broker of the other part and it was intended that the decision of the arbitrator would be accepted as final.

8. The arbitrator reported on 14 April 2009. While he accepted that the complainant suffered from several psychological disorders, he concluded the disability was 'of a temporary nature'. Two of the disorders were said to be 'in principle reversible, if treated adequately'.

9. On 22 May 2009 the complainant was informed that, as a result of the arbitrator's findings, he would be expected to return to work on the basis of a structured return-to-work programme. He was also advised that if he did not report for work, the Director-General would initiate termination procedures as provided in Staff Regulation 9.1(a). Regulation 9.1 provides:

> '(a) The Director-General may terminate the appointment of a staff member prior to the expiration date of his or her contract if the necessities for the service require abolition of the post or reduction of the staff; if the services of the individual concerned prove unsatisfactory; if the conduct of a staff member indicates that he/she does not meet the highest standards of integrity required by the Organisation; **if the staff member is, for reasons of health, incapacitated for further service**, or if facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of appointment,

should, under the standards established under these Staff Regulations, have precluded his or her appointment.

(b) No termination under subparagraph (a) shall take place until the matter has been considered and reported on by a special advisory board appointed for that purpose by the Director-General.

(c) The Director-General shall terminate the appointment of a staff member in case the State Party of which the staff member is a citizen ceases to be a member of the Organisation.' (Emphasis added.)

10. The complainant stated at a meeting on 27 May 2009 that he did not intend to return to work. He failed to do so on 2 June, the return date nominated by the OPCW. By letter dated 29 June 2009 the complainant was informed by the Head of the Human Resources Branch that, as he had not returned to work as requested, the Director-General had decided to propose the termination of the complainant's employment. To this end, the letter indicated that the Director-General proposed to convene a special advisory board (SAB). This was required by Staff Regulation 9.1(b) as supplemented by an Administrative Directive of 22 July 1997 (AD/ADM/5).

11. The SAB advised against terminating the complainant's contract on the grounds of his being incapacitated for further service due to reasons of health. This was the ground originally proposed to the SAB by the Head of the Human Resources Branch in a memorandum of 17 June 2009 to the members of the SAB. In a memorandum of 24 June 2009 he requested that the information provided to the SAB be corrected so that it would consider the termination of the complainant's appointment on the ground that he did not return to work. However, the SAB did advise that the complainant 'could be terminated in accordance with staff rule 9.1(a), not limited to the conditions stated in [the memorandum of 17 June 2009]'.

12. In a letter dated 20 October 2009 the complainant was informed that the Director-General had decided to terminate his employment because his services had proved to be unsatisfactory."

The decision of 1 October 2013 impugned in the present case affirmed, in substance, this decision communicated on 20 October 2009.

6. In his brief, the complainant advances a number of arguments impugning the decision of 1 October 2013. Several can be disposed of briefly. One is that an allegation of failure to report to work is a charge of misconduct and the complainant should have been given an opportunity to defend himself as provided for in the disciplinary

procedures in the Staff Rules. The Tribunal notes that a distinction can be drawn between an allegation of unsatisfactory service and an allegation of misconduct (see, for example, Judgments 247, consideration 13, 1163, consideration 5, and 1208, consideration 2). An allegation of unsatisfactory conduct must involve disciplinary procedures but this is not so if the allegation is simply one of unsatisfactory service (see, for example, Judgments 1501, consideration 3, and 1724, consideration 14). The OPCW was not obliged to follow the disciplinary procedures before terminating the complainant's contract.

7. Another argument which can be disposed of briefly appears to be that the reason given for the termination of the complainant's contract (unsatisfactory service) was to avoid the need to terminate his contract on the ground of incapacity for reasons of health. This possibility was adverted to by the Tribunal in Judgment 3235, consideration 21. In substance this is an allegation of bad faith. That is to say, an allegation that the OPCW elected to ultimately pursue the ground of "unsatisfactory service" to avoid obligations which otherwise may have arisen if the ground was "incapacity for reasons of health". As the history of the matter set out earlier demonstrates, it is quite clear the OPCW did prevaricate about the ground. However, the complainant bears the burden of establishing bad faith (see, for example, Judgments 1776, consideration 24, 3407, consideration 15, and 3738, consideration 9), and he has not discharged that burden in this matter.

8. Two arguments advanced by the complainant warrant greater attention. They are linked. The first is that if the OPCW intended to terminate his contract for reasons of unsatisfactory service, he should have been informed either through a negative performance appraisal report or precise warnings that his service had to improve (see, for example, Judgments 1872, consideration 9, 3224, consideration 7, and 3252, consideration 8). This is a manifestation of the duty of an organisation to act in good faith towards its staff (see, for example, Judgment 3613, consideration 27). The argument is that this did not happen in the present case but should have. The second argument is that the OPCW moved immediately to terminate the complainant's contract without

exploring options to secure a safe working environment including a new position with a new supervisor and possible part-time work and drawing up a return to work programme.

9. As noted earlier, the complainant was informed by a letter dated 22 May 2009 (from the Head of the Human Resources Branch) that he had to report for duty, in effect, on 2 June 2009, and if he did not return to duty then steps would be taken to terminate his contract. He was told in the letter he "[would] be placed on a structured return to work programme under the guidance of the Health and Safety Branch". A meeting took place on 27 May 2009 involving the complainant, Ms F.A. and Dr R. Ms F.A. was the Head of Entitlements and Benefits. There are several accounts in the evidence of what took place at that meeting. One is a document that has the appearance of being minutes. Another is a memorandum of Dr R. dated 10 August 2010 (a memorandum from Dr R. to the chair of the SAB). In that memorandum Dr R. said that the minutes reflected his recollection of the meeting. Another is the e-mail of 15 October 2010 from Dr R. to the chair of the SAB.

10. The minutes record the complainant as saying that he was not going to return to work. That had been preceded by a request from Dr R. directed to the complainant that he come back with a "definite and clear response to the letter [of 22 May 2009] from Mr A. [Head of the Human Resources Branch]". The complainant's statement he was not going to return to work was followed by a request from Ms F.A. to "put it in writing in response to the letter".

11. The complainant's statement at the meeting of 27 May 2009 that he was not going to return to work has to be viewed in a broader context. Some of the context is provided by Dr R.'s memorandum of 10 August 2010 and his e-mail of 15 October 2010 to the chair of the SAB. In the former Dr R. explained the complainant was given a "*general* outline of the medical aspects of his [return to work] programme" and general details of what the program might initially entail in terms of working hours and days of work per week and how that might evolve. Dr R. recorded that the complainant appeared to be

comfortable with this level of detail. He also recorded that the complainant was provided with answers to questions concerning administrative elements of the programme such as "pay and a number of other matters". The tone of this account is fairly matter of fact. The tone of the account in the e-mail 15 October 2010 is a little different. That e-mail will be discussed shortly.

12. The day before the meeting, the complainant corresponded by e-mail with Ms F.A. He requested clarification of a reference made by Mr A. to a structured return to work programme under the guidance of the Health and Safety Branch. He noted that Dr R. considered him unfit for work and he briefly addressed this issue. Ms F.A. replied that the return to work programme was prepared by Dr R.

13. After the meeting, on 15 June 2009, a lawyer who was then acting for the complainant wrote to Mr A. This was a fortnight before Mr A. wrote the letter of 29 June 2009 informing the complainant that the Director-General had decided to propose the termination of the complainant's appointment "since [he] did not return to work as requested". In the lawyer's letter (which was sent by e-mail) a number of detailed, sensible and appropriate questions are posed about what the return to work programme might entail. The letter goes on to say "[the complainant] can only decide if it is sensible to resume his duties when the abovementioned questions are answered. Furthermore, his decision depends on what the alternative will be." A series of questions are then asked about the consequences of the termination of his contract. This letter remained unanswered and on 1 July 2009 the complainant's lawyer sent an e-mail to Mr A. asking for a swift response to the letter of 15 June 2009. The evidence of the parties, including that of the OPCW, does not reveal if there ever was a response. The Tribunal infers there was never a response.

14. Indeed on 6 July 2009 the complainant sent an e-mail to Mr A., copied to his lawyer and to Ms F.A., in which he firstly referred to the letter of 29 June 2009 and then said: "[t]he reason I did not report for duty is that I am still waiting for your reply on the e-mail my legal

counsel [...] sent you on 15 June 2009." The complainant attached the e-mail of 15 June and the later reminder of 1 July 2009. He went on to say: "I still consider resuming my duties at the OPCW, but before I make this decision I would like to be informed what the return to work programme will imply. This is a decision with possibly great consequences for me (medical, workload/content of job, financial) so I hope you can answer my questions on this subject, which I asked in the letter of my legal counsel, in a short term." Again, the evidence of the parties, including that of the OPCW, does not reveal if there ever was a response to the 6 July 2009 e-mail. The Tribunal infers there was never a response.

15. In his memorandum of 10 August 2010, Dr R. referred to the correspondence of 15 June and 6 July 2009 and said that he was not aware of the correspondence until 21 October 2009. He suggested that had he been aware he "would have arranged a medical consultation and a meeting with the [complainant's] supervisor to get the level of detail necessary, and provided a written programme". He said he made an offer to the Human Resources Branch on 27 October 2009 to provide the complainant with a written return to work programme, but this offer was declined.

16. In his e-mail of 15 October 2010, Dr R. addressed what happened at the meeting of 27 May 2009 and subsequently. Dr R. said:

> "[The complainant] went away [from the meeting] and came to the conclusion that he couldn't decide without more information on what his return to work program would be. He had been absent for almost 2 years. As he was suffering a psychological illness he felt was related to work, clearly coming back to work could put him at risk of worsening that illness. [...] He asked [the Human Resources Branch] 3 times for a written return to work program that gave some of this detail.
>
> [The Human Resources Branch] did not give him a program. I know [that] at one stage [the Human Resources Branch] responded saying he had received all the necessary detail in the meeting of the 27th, although this is not true – he had received only very general information.
>
> [The Human Resources Branch] never informed [the Health and Safety Branch], who are responsible for return to work programs, of his request.

> In summary, [the complainant] didn't return to work because he felt he needed more information, and was terminated for this. The following comments are from an occupational health perspective.
>
> [The complainant] asked for details of his return to work program that he didn't have. Was this a reasonable request? Yes, it is entirely reasonable.
>
> [The Human Resources Branch] did not give him the information but made it conditional on his coming to work first. Was this a reasonable response? No. There is no reason I can think of which would justify denying a sick man some simple information that will help him make a decision about his future health. It was a reasonable plan for him to come back to work and then receive a return to work program when all sides first had it as an option at the meeting of the 27th, but once [the complainant] specifically raised his concerns and asked for this information earlier, the original plan had to be set aside. [The Human Resources Branch] insisting on it without a reason makes it unreasonable.
>
> The great tragedy is that had [the Health and Safety Branch] been told of [the complainant's] request, we could have given him exactly what he asked without any issue. Twenty minutes work. This whole matter would not be in dispute. I do not know why they refused to let [the Health and Safety Branch] know about a return to work plan – I can't think of anything more clearly for us."

17. In the letter of 1 October 2013 detailed reference is made to an analysis (contained in a memorandum of 4 November 2010) undertaken by the OPCW's then Legal Adviser of the e-mail of Dr R. of 15 October 2010. The analysis is said to have been undertaken to determine "the weight to be attributed to [the e-mail]". One of the conclusions of the Legal Adviser was that the e-mail did not contain any new factual information nor any new medical assessment. Reference was made to apparently contradictory observations of Dr R. about the complainant's state of health and, later, to quoted statements of Dr R. thought to be generally supportive of the position taken by the OPCW. The letter said:

> "Hence, and after careful reconsideration of all the aforementioned elements, including Dr [R.]'s 15 October 2010 e-mail and the other annexed e-mails sent in connection with the discussions with you on the return to work programme the Director-General confirms that none of the evidence on the file supports your argument that you were fully and permanently incapacitated from further work due to service-incurred disability, or even a non-service incurred disability, and, therefore, could not return to work."

What this letter does not do is address one of the important issues raised in the e-mail of 15 October 2010, namely the failure of the OPCW to respond to the complainant's reasonable request made through his then lawyer for details about what the return to work programme would entail were he to decide to follow that path and resume working.

18. The aforementioned issue is, however, addressed in the OPCW's pleas. In its reply (which incorporated by reference the submissions made in its reply in the proceedings leading to Judgment 3235) and its surrejoinder respectively, the basic point made by the OPCW is that "[i]t was legitimate to consider the discussion of details of a return-to-work plan as an element of the Complainant's duties and therefore take this step when the Complainant reported back for duty" and "[t]he Defendant had recognised that the Complainant's return to work would require a structured return-to-work programme to facilitate the resumption of his duties, but his attendance at the office was a prerequisite for this". There are two difficulties with this argument. The first is that this point, if correct, could have been communicated to the complainant by responding to the complainant's then lawyer in response to the letter of 15 June 2009. This was not done. Secondly the e-mail of Dr R. (whose Branch was responsible for drawing up return to work programmes) of 15 October 2010 said two things. The first was that this approach of the OPCW, through its Human Resources Branch, was unreasonable. The Tribunal agrees. The second was that had Dr R. known of the complainant's request made directly and through his lawyer for particulars of a return to work programme, "we could have given him exactly what he asked without any issue" and this would have entailed 20 minutes work. Plainly, in Dr R.'s opinion, a return to duties was not a condition precedent for the preparation of a return to work programme.

19. The Tribunal rejects the complainant's argument that he was entitled to a performance appraisal concerning his service. Plainly that was not appropriate in the circumstances where the issue was not service at a less than satisfactory level but rather no service because of absence.

20. However, as noted earlier, the provision of a performance appraisal is a manifestation of a broader duty of care to act in good faith. In the present case, the OPCW's focused and singular determination to proceed with the termination of the complainant's contract because he had not returned to work by 2 June 2009 was, in all of the circumstances, unreasonable and a breach of its duty of care towards the complainant. The OPCW knew that the complainant had had a long history of mental illness. It could not be said, in any reasonable or balanced way, that the conclusion of the arbitrator signalled that the complainant had entirely overcome that illness such as to enable him to return to work without hesitation. It was clear from the complainant's lawyer's letter of 15 June 2009 that the proposal that the complainant return to work was not being rejected out of hand. The complainant's hesitancy and equivocation was not unreasonable in all of the circumstances and he should have been treated by the OPCW with a greater measure of compassion. More importantly, the OPCW should not have proceeded almost immediately to propose the termination the complainant's contract without addressing and responding to that letter of 15 June 2009.

21. The Tribunal should add that it does not accept one particular argument of the OPCW that the complainant had abandoned his employment. A staff member abandons her or his post if she or he shows an intention not to return (see Judgment 392, consideration 4). In all of the circumstances of this case, including what is said in the letter of 15 June 2009, it cannot be said that the complainant manifested such an intention.

22. For the breach of the OPCW's duty of care, the complainant is entitled to damages which the Tribunal assesses in the amount of 40,000 euros. This is not a case which would warrant the award of exemplary damages, as sought by the complainant, nor one in which an order for reinstatement should be made. The complainant is entitled to costs assessed in the amount of 6,000 euros.

23. The OPCW sought the joinder of various complaints or proceedings including the complainant's fifth complaint together with the present complaint. Judgment has already been given with respect to his fifth complaint. The only other complaint which might conceivably be joined with this matter is the complainant's seventh complaint filed on 22 December 2015. However, as will be apparent from Judgment 3854, also delivered this day, joinder is inappropriate.

DECISION

For the above reasons,

1. The OPCW shall pay the complainant damages in the amount of 40,000 euros.
2. It shall also pay the complainant 6,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 8 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ