

**V. (No. 7)**

*v.*

**OPCW**

**124th Session**

**Judgment No. 3854**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr R. G.M. V. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 22 December 2015 and corrected on 20 April 2016, the OPCW's reply of 14 July, corrected on 20 July, the complainant's rejoinder of 3 October 2016, the OPCW's surrejoinder of 19 October 2016, the complainant's additional submissions of 23 November 2016 and the OPCW's final comments thereon of 7 February 2017;

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 not award him compensation for a service-incurred disability.

Facts relevant to this case can be found in Judgment 3235, delivered in public on 4 July 2013, concerning the complainant's first complaint, Judgment 3442, delivered in public on 11 February 2015, concerning the complainant's second, third and fourth complaints, and Judgment 3853, also delivered this day, concerning the complainant's sixth complaint. Suffice it to recall that in Judgment 3442 the Tribunal set aside a decision of the Director-General of 11 March 2013 to the

extent that he rejected the complainant's third appeal. In that appeal the complainant sought to set aside both the Director-General's decision of 19 December 2011 not to review his previous decision concerning the complainant's claim for service-incurred permanent disability and the Director-General's refusal to resubmit the matter to the Advisory Board on Compensation Claims (ABCC). The Tribunal remitted to matter to the OPCW for consideration, awarded the complainant moral damages and costs, and dismissed his remaining claims.

By a letter of 20 February 2015 the complainant was informed by the Administration that the OPCW would resubmit the claim to the ABCC and apply the procedure set out in that letter. The ABCC held numerous meetings during which it considered, *inter alia*, medical evidence provided by the complainant and the OPCW. By a memorandum of 28 October 2015 the ABCC found that the evidence put before it did not support the complainant's claim that he had suffered a service-incurred disability, which was distinguishable from any pre-existing condition or disability, as a result of his treatment by the OPCW during the arbitration process in 2009. Accordingly, it considered that the complainant was not entitled to compensation under Administrative Directive AD/ADM/13.

By a letter of 13 November 2015, which is the impugned decision, the complainant was informed that the Director-General had decided to follow the ABCC's recommendation.

The complainant asks the Tribunal to set aside the impugned decision. He seeks payment of past and future benefits as provided for under the OPCW's Staff Regulations and Staff Rules and insurance policies for a total permanent disability, with interest from the due dates. He claims material damages, moral damages in the amount of 50,000 euros, and legal costs. He requests the Tribunal to order other appropriate relief as it deems just and proper, including giving consideration to the appointment by the Tribunal's President of an independent medical expert paid for by the OPCW.

The OPCW asks the Tribunal to uphold the impugned decision and to deny the complainant's claims for relief.

## CONSIDERATIONS

1. By letter dated 13 November 2015 the complainant was informed that the Director-General had decided that he was not entitled to compensation on the grounds that he had suffered a service-incurred disability which was distinguishable from any pre-existing condition or disability, as a result of his treatment during the arbitration process in 2009. This decision is impugned in these proceedings. The decision was based on a recommendation of the ABCC in a report dated 28 October 2015 following deliberations of the ABCC commencing in March 2015.

2. This is the complainant's seventh complaint. Much of the background to the present case is set out in Judgments 3235, 3442 and Judgment 3853, also delivered this day. The ABCC's deliberations in 2015 flowed from Judgment 3442. In the proceedings before the Tribunal which led to that judgment, the complainant impugned various decisions (express and implied) including a decision of the Director-General of 11 March 2013. It is unnecessary to repeat the somewhat complicated history of events leading to that decision and what the decision entailed. Suffice it to note that in Judgment 3442, the Tribunal set aside the decision of 11 March 2013 to the extent that the Director-General rejected the complainant's third internal appeal of 15 March 2012, being an appeal against a decision of 19 December 2011 not to review his previous decision concerning the complainant's claim for service-incurred permanent disability and refusing to resubmit the matter to the ABCC. The Tribunal also remitted the matter to the OPCW for consideration having particular regard to what was said in considerations 20, 23, 24 and 26 of the Tribunal's judgment.

3. In its report of 28 October 2015 the ABCC described what it understood to be its task, namely to consider the question of whether the complainant had experienced a service-incurred disability which was distinguishable from any previously existing condition or disability, specifically as a result of his treatment by the OPCW during the arbitration process. The ABCC identified the relevant period as commencing 4 July 2008 (the date of the insurance broker's letter denying the complainant's

claim for a permanent and total non-service incurred disability) and concluding on 18 November 2009, the date when the complainant ceased to be a staff member of the OPCW. There is no suggestion in the pleas in this matter that the ABCC mis-described its task.

4. The complainant's arguments challenging the impugned decision mainly focus on the procedures followed by the ABCC and its reasoning. It is convenient to commence a discussion of those arguments by addressing the consideration by the ABCC of reports provided by Dr R. and, in particular, the use of those reports when considering the opinion of Dr S. (whose evidence was provided by the complainant) and, specifically, her conclusion that the complainant had suffered from Post Traumatic Stress Disorder (PTSD). Dr R. had been the Head of the OPCW's Health and Safety Branch for a period concluding in October 2011 when he left the OPCW. He had been actively involved in monitoring the complainant's sick leave and he had also advised him with respect to his course of treatment. Dr S. was a psychiatrist on whose opinion the complainant relied in the proceedings before the ABCC.

5. Dr S. examined and assessed the complainant on 30 September and 1 and 2 October 2011. Her assessment was contained in a report dated 13 October 2011. She produced a further report dated 26 March 2015. In that second report she said she had had regard to her first report, to a report of Dr V.d.B. of 4 June 2008 and to a report of Dr P.L.R. of 14 April 2009. She was interviewed by the ABCC on 21 May 2015 and the minutes of that interview are in the material before the Tribunal (as well as some comparatively minor corrections to those minutes submitted by the complainant's lawyer to the Chair and Secretary of the ABCC by an e-mail of 18 September 2015).

6. Dr S.'s report of 26 March 2015 commenced with the question she had been asked to answer namely: "Did [the complainant] incur a work-related disability, which is distinguishable from any previously existing conditions or disabilities, specifically as a result of his treatment by the OPCW during the arbitration process (in the time period between 4 July 2008 and 18 November 2009)." At the conclusion of the report

she provided what she described as a summary answer to the question asked. The answer was:

“Yes, [the complainant] did incur a permanent work-related disability, which is distinguishable from any previously existing conditions or disabilities, specifically as a result of his treatment by the OPWC during the arbitration process.

[The complainant] suffers from a severe and complex psychological disorder with a clinical picture of a recurring severe depression with suicidal tendencies and post-traumatic stress disorder. These two psychological disorders, diagnosed [in] 2011, are distinguishable from all previous psychological disorders and diagnoses and clearly developed as a result of the arbitration process and are thus work-related.”

7. Dr R. provided his views in a document submitted to the ABCC on 5 June 2015 (but signed 22 July 2015) responding to questions posed by the ABCC. This was supplemented by a document dated 24 July 2015 responding to questions posed by the complainant’s lawyer. Importantly, for present purposes, Dr R. said in the latter document that the first document was “not a medical report as [he] did not have access to either the medical record or to [the complainant’s] claim against the OPCW”.

8. The ABCC, in the course of discussing the question of whether the complainant had suffered from depression, and whether he had suffered severe depression distinguishable from earlier depression during the “arbitration period” as Dr S. had concluded, referred to the answers given by Dr R. It said:

“While the Board places limited weight on [Dr R.’s] answers to its questions in view of the fact that they do not constitute a medical report and are based on his memory of the case, the answers nonetheless provide valuable insight into the events and [the complainant’s] condition from the perspective of the Head of the [Health and Safety Branch] at the relevant time. Further, as noted above, the other medical reports on file are largely consistent with [Dr R.’s] analysis of [the complainant’s] condition.”

9. For a decision maker (or an advisory body) to say they place “limited weight” on a document or testimony can beg the question of the true reliance placed on that document or testimony. Obviously it

involves placing some weight on the document or testimony. However reading the report of the ABCC on this topic (the complainant's depressive illness), it is tolerably clear that Dr R.'s opinion was influential. This conclusion is reinforced by the ABCC's consideration of Dr S.'s opinion that the complainant suffered from PTSD, a diagnosis which the ABCC rejected. What it said in relation to Dr R.'s views on this topic was:

“In addition, the Board notes that, in his answers to the Board's questions, [Dr R.] stated that [Dr S.'s] PTSD diagnosis ‘should itself be questioned’ since [the complainant] did not have PTSD the last time he saw him and he did not have ‘any reason to have PTSD’. While Dr R. is not a psychiatrist, the Board considers that he is a reliable expert in this matter given his long experience in the relationship between the workplace and an individual's mental health and his deep understanding of the specific aspects relating to the work in the OPCW, as well as the fact that he saw [the complainant] several times during the arbitration period and had independent knowledge of the events of the time.”

While some considerable latitude should be shown by the Tribunal to the way bodies such as the ABCC express themselves, the above passage unambiguously treated Dr R. as a “reliable expert in this matter” and his opinion was one factor, and almost certainly an important factor, in the rejection of the opinion of Dr S. that the complainant suffered from PTSD which had its genesis in events during the “arbitration period”. It can reasonably be inferred that the ABCC did place significant weight on the opinion of Dr R., notwithstanding that he was not a psychiatrist and notwithstanding his reasonable and appropriate concession that his answers to the ABCC's questions should not be treated as a medical report for the reasons he gave. The ABCC's material reliance on the views of Dr R. was misplaced and reveals a flaw in its decision-making.

10. Apart from its reliance on Dr R.'s views, the ABCC's rejection of Dr S.'s opinion was based on several other considerations. Suffice it to mention one. The ABCC referred to medical opinions, including those of Dr S., that the complainant had suffered from depression and sleeping disorders for many years prior to the arbitration period. It then said it had difficulty accepting Dr S.'s conclusion that it was the way the complainant experienced how his employment was terminated which

caused his severe depression. The ABCC went on to note that Dr S. first met and diagnosed the complainant in late 2011, “some two years after his termination at the OPCW, and her knowledge of the events during the arbitration period was entirely dependent on the information shared by [the complainant], as opposed to an observation of his condition contemporaneous with the period in question”. Diagnosis based on a patient’s account of past events is entirely orthodox and particularly so if the patient’s account of past events is not challenged. But the ABCC then said: “[i]n these circumstances, the Board would be unable to rely on [Dr S.’s] opinions on the causation or the distinguishable nature of [the complainant’s] conditions during the arbitration period without other factual or medical support.” Thus the ABCC was saying, in effect, that Dr S.’s opinion needed to be corroborated and one reason why that was so was because her diagnosis was made after the event and was based on what she was told by the complainant.

11. The impugned decision of 13 November 2015 was based on the conclusions and recommendation of the ABCC. There are flaws in the ABCC’s reasoning. Thus, the impugned decision is unlawful and will be set aside. The complainant is entitled to moral damages. The Tribunal sets the amount of this award at 10,000 euros.

12. The litigation between the complainant and the OPCW has lasted several years and it is desirable in the interests of the parties and the public interest to bring it to an end. Accordingly, the OPCW will be ordered, in agreement with the complainant, to appoint a medical expert with a specialisation in psychiatry within sixty days from the date of the public delivery of this judgment. The medical expert will assess whether the complainant incurred a work-related disability, which is distinguishable from any previous existing conditions or disabilities, specifically as a result of his treatment by the OPCW during the arbitration process (in the time period between 4 July 2008 and 18 November 2009). In order to make this assessment the medical expert will examine the complainant, take into consideration all the evidence in the file submitted to the Tribunal in these proceedings and the judgments of the Tribunal dealing with the complainant’s first to sixth complaints. The expert may

ask the parties for any pertinent information, while respecting the adversarial principle. The expert will submit her or his report to the OPCW, which will forward it to the ABCC for consideration. The OPCW will notify the President of the Tribunal in the event that the parties do not agree on the appointment of the medical expert. Upon receiving such notification, the President of the Tribunal will appoint a medical expert by her or his own order and notify the parties accordingly. The OPCW will be ordered to pay the expert's fees and the costs of the examination. The ABCC, as a matter of urgency, and having given the parties the opportunity to comment on the new medical report, will make a recommendation to the Director-General on the basis of that report and the Director-General will take a new decision.

13. The complainant is entitled to an award of costs. The Tribunal sets the amount of this award at 6,000 euros.

#### DECISION

For the above reasons,

1. The impugned decision of 13 November 2015 is set aside.
2. The case is remitted to the OPCW for consideration by the ABCC solely on the basis of a new medical report, in accordance with consideration 12, above.
3. The OPCW, in agreement with the complainant, shall appoint a medical expert with a specialisation in psychiatry within sixty days from the date of the public delivery of this judgment, in accordance with consideration 12, above. The medical expert shall:
  - (a) assess whether the complainant incurred a work-related disability, which is distinguishable from any previous existing conditions or disabilities, specifically as a result of his treatment by the OPCW during the arbitration process (in the time period between 4 July 2008 and 18 November 2009);

- (b) examine the complainant, take into consideration all the evidence in the file submitted to the Tribunal in these proceedings and the judgments of the Tribunal dealing with the complainant's first to sixth complaints, and may ask the parties for any pertinent information, while respecting the adversarial principle;
  - (c) submit her or his report to the OPCW, which shall forward it to the ABCC for consideration.
4. In the event that that parties do not agree on the appointment of the medical expert, the OPCW shall notify the President of the Tribunal, who will then appoint a medical expert by her or his own order and notify the parties accordingly.
  5. The expert's fees and the costs of the examination shall be paid by the OPCW.
  6. The ABCC, as a matter of urgency, and having given the parties the opportunity to comment on the new medical report, shall make a recommendation to the Director-General on the basis of that report and the Director-General shall take a new decision.
  7. The OPCW shall pay the complainant moral damages in the amount of 10,000 euros.
  8. It shall also pay the complainant 6,000 euros in costs.
  9. All other claims are dismissed.

In witness of this judgment, adopted on 11 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