

**V. (No. 8)**

*v.*

**OPCW**

**130th Session**

**Judgment No. 4298**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr R. G.M. V. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 17 August 2018 and corrected on 14 September, the OPCW's reply of 27 December 2018, the complainant's rejoinder of 12 April 2019 and the OPCW's surrejoinder of 14 August 2019;

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

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

The complainant challenges the decision to reject his claim for compensation for a service-incurred disability.

Facts relevant to the present complaint are to be found in Judgment 3854, arising from the complainant's seventh complaint with the Tribunal. In that judgment, in addition to setting aside the impugned decision and awarding the complainant moral damages and costs, the Tribunal remitted the matter to the OPCW and made the following orders in points 3, 4 and 6 of its decision:

- “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 [of the judgment]. 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 [Advisory Board on Compensation Claims (ABCC)] for consideration.
  4. In the event that the 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.
- [...]
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."

On 17 October 2017, in accordance with point 4 of the decision in Judgment 3854, the President of the Tribunal appointed Professor V. to perform the tasks set out in point 3(a), (b) and (c) thereof. Professor V. submitted his report on 14 March 2018 concluding, *inter alia*, that "[the complainant] did incur a work related disability which was distinguishable from any previously existing condition or disability. Before the arbitration period there was some hope in [the complainant] that the situation would be resolved. During the arbitration period symptoms of depression became more severe and they did not remit despite medical and psychological treatment. It is not likely that the onset of his burn-out and depressive symptoms could be attributed to other factors in his life." The report bore the signatures of Professor V. and Dr L., an expert in clinical psychology and neuropsychology.

Under cover of a letter dated 20 March 2018, the Registrar of the Tribunal forwarded Professor V.'s report to the OPCW for consideration by the ABCC pursuant to points 3(c) and 6 of the Tribunal's decision in Judgment 3854. The ABCC met on 23 April to discuss procedural matters. Following a written exchange of comments between the parties, the ABCC met again on 2 July to consider Professor V.'s report and

the parties' comments thereon. In a memorandum of 10 July 2018, the ABCC recommended to the Director-General not to accept the complainant's claim of a service-incurred permanent disability on the grounds that Professor V.'s report was inconsistent and did not convincingly support a determination that the complainant's reported disability was distinguishable from any pre-existing medical conditions arising before the arbitration period. By a letter of 20 July 2018, the complainant was informed that the Director-General had decided to follow the ABCC's recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the OPCW to pay him past and future disability benefits, as provided for under the Staff Regulations and Interim Staff Rules of the Technical Secretariat of the OPCW, Appendix D to the Staff Rules of the United Nations, and relevant insurance policies, together with interest from due dates. He claims material damages and 25,000 euros in moral damages. He also claims an additional amount in moral damages for the OPCW's delay in executing Judgment 3854. He seeks costs and such other relief as the Tribunal deems just and appropriate.

The OPCW asks the Tribunal to dismiss the complaint and all requests for relief.

### CONSIDERATIONS

1. The complainant has been seeking, for several years, compensation for what he now claims is a service-incurred disability arising from his service with the OPCW, though initially his claim for compensation was based on the contention that his disability was non-service incurred. He has been unsuccessful in his attempts to secure compensation on either basis. Much of the now lengthy history is discussed in Judgment 3854 or earlier judgments referred to by the Tribunal in that judgment. Suffice it to note that by the time that judgment was rendered, it was necessary, having regard to the Tribunal's reasons for judgment, for a medical expert to be appointed.

2. The Tribunal's orders in Judgment 3854 contemplated the appointment of a medical expert by agreement of the parties initially, but in the absence of agreement, the appointment would be by the

President of the Tribunal. There was no agreement and the President appointed Professor V. as the medical expert. His task was described in point 3 of the orders as follows:

“[...] 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.”

The temporal limitation in point 3(a) of the orders arose from the history of the litigation which is unnecessary to set out in this judgment.

3. The matter was initially considered by the ABCC, which recommended to the Director-General that the complainant's claim not be accepted. It gave reasons for this conclusion in a memorandum to the Director-General dated 10 July 2018. In the decision impugned in these proceedings, the Acting Head of Human Resources, on behalf of the Director-General, by letter to the complainant dated 20 July 2018 said the Director-General had accepted the ABCC's advice and decided to follow its recommendation and, implicitly, rejected the complainant's claim. Thus the Director-General can be taken to have adopted the reasoning of the ABCC.

4. In the memorandum of 10 July 2018 to the Director-General the ABCC said:

“5. The ABCC found that the medical report [of Professor V.] was inconsistent and did not convincingly support a determination that [the complainant's] reported disability was distinguishable from any previous existing conditions or disabilities identified prior to the arbitration period. The ABCC also noted that the report was contradictory in itself as it referred to a medical record of depression and burn-out of [the complainant] prior to the arbitration period (e.g., section 8, page 20). However, elsewhere the report stated that there was an ‘absence of documented or clinical evidence of a psychiatric disorder of [the complainant] in the years preceding the arbitration period’ (section 10, page 23).

6. With regards to the question whether the term ‘work-related disability’, which was used in the medical report, and the term ‘service-incurred disability’ were interchangeable, the ABCC agreed that the terms were not necessarily synonymous. A work-related disability could refer to a condition which impairs the ability to carry out a job; it does not necessarily mean that the inability has been caused at work. In contrast to that, a service-incurred condition is described as something ‘attributable to the performance of official duties on behalf of the Organisation’ (per Administrative Directive AD/ADM/13/Rev.2 at paragraph 1). Nevertheless, after discussing the report and comments, the ABCC concluded that [the complainant] had not experienced a condition or disability during the arbitration period that was distinguishable from a prior existing condition or disability, whether work-related or service-incurred.”

5. The statement in the first sentence of paragraph 6 is difficult to understand. To say an expression is “not necessarily synonymous” with another expression appears to proceed on the basis that one or both of the expressions have two or more meanings. That is, they are synonymous in one or more combinations of meanings, but are not in another or other combinations. The ABCC then sought to demonstrate how they might not be synonymous, firstly, by identifying a meaning the expression “work-related disability” could have, namely “a condition which impairs the ability to carry out a job” and, secondly, by adding that the expression “does not necessarily mean that the inability has been caused at work” (emphasis added). This reasoning is tendentious and plainly intended to discredit the conclusion of Professor V. and, indirectly, the order actually made by the Tribunal which Professor V. was intending to faithfully follow. The identification by Professor V. of his mandate at the beginning of his report and repeated in his conclusion (and repeating what was in the Tribunal’s order in Judgment 3854) was to assess whether the possible work-related disability was “a result of his treatment by the OPCW”. That expression plainly raised for consideration a causal connection between what the OPCW had allegedly done, or had permitted to be done, to the complainant at work and whatever disability the complainant may have then been suffering. It was not open to the ABCC to posit the meaning of the expression “work-related disability” as part of a contrived argument to cast doubt on Professor V.’s report and conclusion. Indeed, read in context, the two expressions meant the same thing.

6. The ABCC's approach to the meaning and effect of the Tribunal's order containing the expression "work-related" and Professor V.'s mandate flowing from it, was encouraged by a submission (one of several) of the OPCW in a memorandum to the Chair of the ABCC, dated 22 May 2018, presenting the OPCW's comments on Professor V.'s report, as contemplated by the orders made in Judgment 3854. This particular submission was developed under a heading "The Report assesses [the complainant] as suffering from a 'work-related' disability, but this is different than a 'service-incurred' illness attributable to the performance of official duties". This submission should never have been made. Firstly, it is manifestly wrong, as explained in the preceding consideration. Secondly, it breached the OPCW's duty to act in good faith. It evidences an entirely uncompromising attitude towards the complainant. Plainly enough, an organisation is entitled to adopt a position in relation to any claim of a staff member or former staff member for a benefit. If the organisation believes on reasonable grounds, that the benefit is unavailable, it is open to the organisation to resist the claim. But that is not a license to take all or any unreasonable point in doing so.

7. Thirdly, the Tribunal has no doubt that the OPCW understood the task its order in Judgment 3854 required of Professor V. Neither the expression "work-related" nor the expression "service-incurred" is a term of art embodied in a normative legal document. The formulation found in Staff Regulation 6.2 and Interim Staff Rule 6.2.03 speaks of injury or illness "attributable to the performance of official duties on behalf of the Organisation". That formulation similarly appears in Appendix D to the United Nations Staff Rules and the OPCW's Administrative Directive AD/ADM/13/Rev.2. In the Tribunal's reasons in Judgment 3854, when setting out the background, reference is twice made to the subsisting issue in terms of whether the complainant had suffered a service-incurred disability (considerations 1 and 3). It is inconceivable that the OPCW believed the Tribunal was entering new and different territory by later using the expression "work-related disability" both in the considerations and decision. Moreover, the entire and lengthy history of this litigation spanning at least seven years quite clearly indicates otherwise. If, in truth, the OPCW had been uncertain about what the Tribunal's orders in Judgment 3854 meant or had considered they deviated from the issue requiring

determination, it could have sought the Tribunal's assistance (see, for example, Judgment 3003, consideration 31). It did not do so. The OPCW, in advancing this submission, breached its duty to execute the Tribunal's judgment in good faith (see, for example, Judgment 3823, consideration 4). The complainant is entitled to compensation for this breach (see Judgment 2684, consideration 10).

8. Professor V.'s report is detailed and 23 pages long. The complainant was assessed for approximately 16 hours. It appears that Professor V. was assisted by a colleague who was a doctor in clinical psychology and neuropsychology. The ABCC said, in the passage first quoted in consideration 4 of this judgment, that the report "was inconsistent and did not convincingly support" a conclusion in the complainant's favour. No explanation was, at that point, given about what the inconsistency was nor, at any point, was any explanation given as to why the report did not "convincingly support" a favourable conclusion. Possibly, but not clearly, the inconsistency was what was said in the two passages of Professor V.'s report to which the ABCC later specifically referred. But the reasons of the ABCC for concluding as it did were inadequate as, necessarily, was the decision of the Director-General effectively adopting those reasons. The ABCC was obliged to explain why Professor V.'s analysis and conclusions did not support a favourable conclusion. The mere assertion that they did not was insufficient (see, for example, Judgment 3919, consideration 13). While the OPCW in its pleas in these proceedings seeks to demonstrate, in some detail, the inadequacies of Professor V.'s analysis and conclusions, this is beside the point. What is relevant are the views of the ABCC and, subsequently, those of the Director-General. It is simply not possible to be satisfied that the ABCC took a fair and balanced approach to the question of whether the complainant was entitled to the benefit he sought. Indeed, for the reasons discussed in consideration 5 of this judgment, there is a distinct possibility it did not.

9. The impugned decision will be set aside. It is inappropriate, as the complainant requests, for the Tribunal to determine his entitlement to the benefit he seeks. Regrettably, the matter needs to be remitted to the OPCW to enable the ABCC to consider afresh the complainant's claim. However, having regard to the approach of the ABCC, as reflected in its memorandum of 10 July 2018 to the

Director-General, the ABCC panel shall be differently constituted (see, for example, Judgments 2996, considerations 15 and 16, 3004, consideration 9, and 3785, consideration 9). The ABCC's duty will be to fairly and honestly consider, on the basis of Professor V.'s report, whether the complainant is entitled to the benefit he seeks. Additionally, if the ABCC is unsure about any aspect of the report of Professor V., it should seek clarification from him. The cost of any further consultation with Professor V. shall be met by the OPCW.

The complainant is entitled to moral damages in the amount of 10,000 euros, as discussed in consideration 7 above. Damages will also be awarded for the delay in resolving this ongoing dispute and the need to remit the matter to the Organisation. The Tribunal assesses those damages in the amount of 5,000 euros.

The complainant is also entitled to costs assessed in the amount of 8,000 euros.

#### DECISION

For the above reasons,

1. The impugned decision of 20 July 2018 is set aside.
2. The matter is remitted to the OPCW in order for a newly constituted ABCC panel to consider it and to make, on the basis of Professor V.'s report, a recommendation to the Director-General on whether the complainant incurred a disability which was attributable to the performance of official duties on behalf of the Organisation as a result of his treatment by the OPCW during the arbitration process.
3. The Director-General shall consider the ABCC's recommendation and shall take a new decision on the complainant's claim within 90 days from the delivery of this judgment.
4. The OPCW shall pay the complainant 15,000 euros in moral damages.
5. The OPCW shall pay the complainant 8,000 euros in costs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 2 July 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ