The Administrative Tribunal,

Considering the complaint filed by Mr D.S. K. V. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 3 June 2005 and corrected on 26 August, the Organisation's reply of 2 November 2005, the complainant's rejoinder of 30 January 2006 and the OPCW's surrejoinder of 3 March 2006;

Considering Article II, paragraph 5, 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. The complainant is a former official of the OPCW. He was born in 1965 and is a Dutch citizen. He joined the Organisation in April 1997 as a computer technician, at grade GS-6, on a short-term appointment at The Hague. In February 1998 he obtained a fixed-term appointment, which was subsequently renewed. On 15 January 2002 he was injured at work when a backup machine fell from the upper plate of a trolley onto his left foot. His injury developed into an illness known as reflex sympathetic dystrophy (RSD), which caused him loss of mobility in his legs. He suffers chronic pain and is confined to a wheelchair; he has also undergone numerous operations in Sri Lanka, his home country.

The complainant exhausted his full entitlement to sick leave on 7 August 2003 and was thereafter declared totally disabled. Although such a determination would normally have led to the termination of his appointment, certain issues regarding the compensation he was to receive were unresolved, and it was decided that the complainant should remain on the OPCW payroll. He was finally separated from service on 31 January 2005.

On the basis of recommendations made by the Advisory Board on Compensation Claims, the amount of compensation to be awarded was the subject of negotiations between the Organisation, Van Breda International (the insurance brokers) and the insurers. On 18 May 2004 the Director of Administration sent the complainant a copy of a letter of 7 May received from Van Breda which set out the compensation the complainant was entitled to based on the OPCW's insurance policy and the relevant provisions of Appendix D to the United Nations Staff Rules. It was indicated that he was entitled to an annual compensation payment equivalent to two-thirds of his final annual pensionable remuneration i.e. 38,755.33 euros; a lump sum of 208,154 euros in compensation for permanent loss of function of both legs; and if he was obliged to depend for his essential personal needs on the attendance of another person he would receive additional compensation "in such amount as may be determined by the Director-General, not exceeding, however, the reasonable cost of such attendance". The Organisation granted the complainant an *ex gratia* payment of 150,000 euros to "meet some urgent requirements", and it agreed to pay his premiums for medical care until such time as he could join the national health system in the Netherlands.

The complainant had obtained estimates for converting his home and car to meet his special needs. He also obtained a report from a Dutch company specialising in loss adjustment, which estimated his loss of earnings and pension at 671,717.61 euros.

There was a continuing exchange of correspondence between the complainant and the Organisation, particularly regarding the amount he was to be paid for the cost of in-home care. In correspondence with Van Breda, the Organisation had proposed that the complainant be paid 11,280 euros per month, amounting to 376.30 euros per day. Van Breda entered into negotiations with the insurers, who proposed paying the complainant a monthly sum of 1,800 euros.

In a letter of 6 December 2004 the Head of the Procurement and Support Services Branch informed the complainant that Van Breda had agreed to try to negotiate with the insurers an increase in their offer to 2,400 euros per month, which would be subject to a yearly review by Van Breda's medical adviser. He listed the total compensation package, showing the benefits and payments that the complainant had already been awarded. He

concluded that there was “an urgent need for [the complainant] to bring this issue to closure” either by accepting the new offer of a monthly lump sum of 2,400 euros for in-home care or by agreeing to a “payment against invoice” arrangement.

On 20 December 2004 the complainant wrote to the Director-General, protesting that the compensation package proposed to him was not satisfactory. He gave specific figures for the loss he had suffered and sought authorisation to appeal directly to the Tribunal.

By a letter of 7 March 2005, which is the impugned decision, the Legal Adviser, replying on the Director-General’s behalf, said that the disability benefits payable to the complainant could not exceed those allowed under the Organisation’s rules. He urged the complainant to accept the disability benefits already offered, as referred to in the letter dated 6 December 2004, including payment for in-home care “on the basis of invoices”. He further informed the complainant that the Director-General had agreed to his request to waive the internal recourse procedure.

In early April 2005 the complainant acknowledged receipt of that letter and indicated that he wished to be paid the amounts referred to in the letter of 6 December 2004 “including the monthly lump sum for in-home care”. He stated that his acceptance of the payments was “without prejudice” to his right to appeal against the letter of 7 March 2005.

The Head of the Human Resources Branch wrote to the complainant on 15 August 2005 informing him that, following negotiations between Van Breda and the insurers, he would be paid a monthly amount of 2,400 euros for in-home care, backdated to 7 August 2003, the date when he had exhausted his entitlement to sick leave. She indicated that in future the amount for in-home care would be paid to him annually, in arrears.

B. The complainant submits that the OPCW is invoking “the scope of its rules” in order to deny him additional compensation.Citing the case law, he contends that according to general principles of law, the Organisation has a legal obligation to assist and protect its staff. While conceding that the OPCW took his case seriously, he argues that the compensation he has been offered is not sufficient, and that several issues are still outstanding.

First, he takes issue with the amount negotiated in respect of in-home care, contending that the 2,400 euros per month – which is to be paid as an annual lump sum of 28,800 euros – is not enough to meet his actual needs. He points out that initially in its dealings with Van Breda the Organisation had argued that he needed 11,280 euros per month and he is not aware of any “event” that can explain why the OPCW changed its position on this issue. Based on the Tribunal’s case law, he argues that the Organisation “is liable for the acts of Van Breda” and if need be the OPCW would have to pay the sum to him and negotiate it afterwards with the insurers.

Secondly, on the basis of estimates obtained by him, he submits that the cost of adapting his house and car would amount to 89,917.45 euros. He notes that the Organisation has never contested either that particular figure or the basis of the calculation.

Thirdly, he focuses on the “Organisation’s liability for negligence”. Referring to his accident, he says that the backup machine fell off the trolley because the upper plate of the trolley was defective. He had clearly been provided with “deficient and low quality transport equipment” and his illness thus resulted from negligence on the part of the Organisation. In his opinion the Organisation was under an obligation to ensure that the said equipment was of “good quality and condition” and that his place of work was safe. As it failed to comply with that obligation, it has to compensate him “entirely” for the injury he has suffered.

Fourthly, the “disability pension” he receives is not indexed. He raises objections because of the loss of purchasing power that will occur each year. He considers that such potential “spoliation” is contrary to the Organisation’s duty to grant “adequate social protection to their former and serving staff members”.

Lastly, he submits that the amounts due to him should be paid retroactively, with interest, from the date they should normally have been paid to him.He contends that he was placed in a “very stressful situation”. He did not know precisely what was going on and was obliged to send many reminders to the Organisation because it did not respond “expeditiously”, which considerably affected his morale.

He asks the Tribunal to set aside the decision of 7 March 2005, inasmuch as it constitutes an adverse decision, and to draw all legal consequences from that rescission, including awarding him both material and moral damages. He seeks payment of the sum of 11,280 euros per month for in-home care, for as long as it is justified, as well as a

lump sum of 89,917.45 euros for adapting his house and car.He also claims compensation for the “moral tort” suffered and seeks an award of costs.

C. In its reply the Organisation acknowledges that it is obliged to pay reasonable compensation to the complainant for his service-incurred injury, its legal obligations in this respect being derived from the complainant’s terms of appointment and the relevant regulations and rules, including Appendix D to the United Nations Staff Rules. It points out, however, that while in April 2005 the complainant had agreed to the compensation set out in the letter of 6 December 2004, he is now seeking additional amounts that fall outside the scope of the disability benefits prescribed by the rules.

It notes that the complainant seeks compensation on the basis of “the Organisation’s liability for negligence”, but submits that his case concerns a claim for compensation under the rules relating to service-incurred injuries and that he has not proved that he has a separate cause of action for “negligence”.

According to the Organisation, the only unsettled issue in the compensation package was the amount for in-home care. It contends that the amount of 11,280 euros that the complainant is claiming cannot be accommodated within the rules. Moreover, it has to be seen in its proper context. It was the figure put forward by the Organisation for the purpose of its negotiations with the insurers. However, it was found by the insurers to be unreasonable. Although the Organisation was not ultimately able to obtain that amount for the complainant, that does not mean that it infringed any applicable rules. In its letter of 6 December 2004 it offered the complainant a specific amount for in-home care.When he replied on 20 December, the complainant rejected that proposed amount as well as the whole compensation package previously offered to him. Because of that, the defendant’s only option with regard to in-home care was to revert to the formula specified in Article 11.4 of Appendix D, namely reimbursement of compensation of amounts “not exceeding the reasonable cost of such attendance”. Similarly, the complainant’s claim for compensation for adapting his home and car falls outside what is provided for in the applicable rules. If the Tribunal were to find in the complainant’s favour on this issue, the Organisation would ask that the amount claimed by the complainant be set against the *ex gratia* amount of 150,000 euros that it has already paid him. It points out that there is no legal basis for his claim regarding indexation of disability benefits; moreover, he has cited no rule specifying that such indexation is required.

It submits that it took “prompt decisions” on the compensation package payable to him, but delay arose because the complainant had expressed a preference for lump-sum payments, which led to protracted negotiations with the insurers. During that time he was kept on the payroll, and so suffered no loss as a result of the delayed payment of his disability benefits.

The OPCW requests the Tribunal to “affirm the compensation package offered to the complainant in the decision impugned”, including payment for in-home care or “attendance” either on the basis of reimbursement of costs that are deemed reasonable within the meaning of Appendix D or, alternatively, on the basis of “monthly lump-sum payments as agreed with Vanbreda”.

D. In his rejoinder the complainant presses his pleas. He notes that the Organisation does not deny that the cause of his injury was the defective upper plate of the trolley on which the backup machine was being carried.

He points out that the purpose of the *ex gratia* payment was to meet “unforeseen miscellaneous expenses” and he objects to the Organisation’s suggestion that the cost of converting his home and car could be deducted from the 150,000 euros he has already received.

E. The Organisation maintains its position, stressing that it went beyond its obligations by making additional payments which legally it was not obliged to make.

Given that the complainant is pursuing his allegations of negligence, it contends that they are not supported by the facts. In support of this argument it produces the report form filled out after the accident, which shows the underlying cause to have been “wrong use of equipment” since it was known in advance that there was a problem with the trolley.

CONSIDERATIONS

1. The complainant is a Sri Lankan born Dutch citizen. On 15 January 2002 he suffered a workplace injury at

the OPCW premises in The Hague when a machine fell from a trolley onto his left foot. The results of this seemingly minor accident were catastrophic and the complainant is now permanently and totally disabled and suffers from a rare illness called reflex sympathetic dystrophy (RSD), which has extended up both of the complainant's legs and requires him to use a wheelchair. He left the Netherlands for Sri Lanka in December 2004, and between 28 December 2004 and 20 April 2005 underwent 22 operations. At the time his complaint was filed he was hospitalised in Sri Lanka, and the expectation is that the RSD will progress over time to other parts of his body, a process that may have already started.

2. On 31 January 2005 the complainant was separated from the service of the defendant Organisation. Prior to that date there was a protracted exchange of correspondence between the OPCW and the complainant regarding an appropriate compensation package. The parties could not reach agreement over certain terms, and the complainant presently appeals the Director-General's decision of 7 March 2005 which set out the Organisation's last offer on disability benefits. That offer included the following:

– a life-long annual compensation of 38,755.33 euros;

– a lump-sum compensation for permanent loss of function of both legs in an amount of 208,154 euros;

– an annual lump sum for in-home care of 28,800 euros (2,400 euros per month);

– the payment by the OPCW of premiums for medical care for the complainant at an annual cost of 2,808.64 euros until he is able to join the national health system in the Netherlands; and

– an *ex gratia* payment of 150,000 euros.

3. By the same letter of 7 March 2005, the defendant informed the complainant that it had agreed to the complainant's request to waive the internal appeal process so that he could apply directly to the Tribunal.

4. The complainant admits that the OPCW has taken his case seriously, but argues that the final compensation package is insufficient. He claims that the current amounts provided would not cover his and his spouse's daily needs in Holland, and that his costs related to in-home care alone would force him to exhaust the compensation already paid to him.

5. The complainant raises five issues with respect to his compensation. He submits that the OPCW's conduct amounts to negligence, and that additional compensation should therefore be awarded. He claims that the proposed in-home care amounts are insufficient. He also claims that he should be compensated for the costs of adapting his home and car. In addition, the complainant submits that his "disability pension" should be indexed. Lastly, the complainant claims that he should be paid retroactively with legal interest. The Tribunal will take up each issue in turn.

*I. Compensation for negligence*

6. The complainant submits that his injury was caused by the OPCW's negligence, and that the defendant breached its duty to maintain a safe work environment. In the Tribunal's view the allegation of negligence adds nothing to the complainant's case: the Organisation properly admits that it is obliged to compensate him adequately for his work-related injuries and whether that obligation arises from the express terms of the contract of employment or from an implied obligation to provide a safe working environment it is not dependent upon any question of negligence or fault on the employer's part. It is common for a mature legal system to provide compensation on a "no fault" basis to employees who suffer workplace injuries; the law of the international civil service can do no less. The present dispute is about quantum, not liability, and the only respect in which the defendant's alleged negligence could have an impact on the assessment of damages would be if the Organisation's conduct was such as to give rise to an order for punitive or exemplary damages. There is simply no question of any conduct of that nature here.

7. The question of negligence being irrelevant to the present case, the Tribunal will not deal with it further.

*II. In-home care payments*

8. The complainant accepted an offer of 2,400 euros per month for in-home care payments without prejudice

to his right to appeal. He claims that this amount is not commensurate with his actual needs, and highlights that the Head of the Procurement and Support Services Branch of the OPCW had earlier stated to Van Breda, the OPCW's insurance brokers, that the minimum amount that would cover the complainant's in-home care was 376.30 euros per day (11,280 euros per month). He seeks an order for payment of that amount.

9. The defendant rightly argues that it should not be held to the amount which it had claimed from Van Breda on the complainant's behalf. While the complainant is correct to make his claim against his employer, the latter must in its turn assert a claim against its insurers for his benefit. It should not be faulted for having made that claim for him or for having put his case as strongly as possible.

10. The parties accept that the starting point of the analysis is Article 11.4 of Appendix D to the Staff Rules of the United Nations, which is incorporated into the OPCW's death and disability insurance policy, as required by Interim Staff Rule 6.2.03. Article 11.4 reads in relevant part as follows:

"Notwithstanding any other provisions of article 11, the Secretary-General may award additional compensation as follows:

(a) Where the injury or illness of a staff member has resulted in total disability of such a nature that the staff member is obliged to depend, for his essential personal needs, on the attendance of another person, either constantly or occasionally, and such attendance entails expense, additional compensation may be paid, in such amount as may be determined by the Secretary-General, not exceeding the reasonable cost of such attendance."

11. It is common ground that the complainant should be reimbursed for the "reasonable cost" of his in-home care. The parties simply disagree as to what is a reasonable amount, and as to whether payments should be made periodically against receipt of invoices or on a lump-sum basis.

12. Dealing first with the latter point, the materials presently before the Tribunal do not allow it to determine the complainant's actual in-home care costs with any accuracy. There are no receipts for in-home care on the record, only estimates which are themselves now well out of date. Moreover, these costs are likely to change over time, due to increased or decreased demand, and possibly due to other factors such as increases in labour costs. In these circumstances, the only reasonable course, notwithstanding the complainant's expressed desire for a lump-sum award, is to require the complainant to provide receipts for in-home care. Reimbursement can then be made against these receipts, and the possibility of either a serious underpayment or a windfall to the complainant would be significantly reduced. The provision of receipts will also enable the parties to respond to changes in expenses as they arise. If for any reason, some or all of the receipts are no longer available, other acceptable proof of payment will be required.

13. The parties currently have different views over the amounts to be paid. This stems from their disagreement as to what should be covered by in-home care. The figure of 11,280 euros is based on the assumption that the complainant requires five hours of home-care per day, seven days a week. In contrast, it appears that Van Breda's medical adviser viewed general home-care as being restricted to general services such as cleaning the house and that such care is only required for a few hours a week. The difference between hiring an in-home care provider on a part-time basis, and hiring one for thirty-five hours a week accounts for most of the discrepancy between the offered figure of 2,400 euros per month, and the initial estimate of 11,280 euros per month.

14. The initial higher estimate likely provides a more accurate reflection of the complainant's current needs and of what may be included in in-home care. While the complainant may have daily nursing care covered under the OPCW medical policy it is likely that, in addition to requiring a nurse, the complainant requires the assistance of another person for housekeeping and to assist him in performing basic functions of daily life. His wife had taken time off to assist him, but the Organisation cannot rely on that and it is clear on the record that the complainant is not independent. The complainant "is obliged to depend, for his essential personal needs, on the attendance of another person, either constantly or occasionally" as provided for by Article 11.4(a), and it seems likely that the need is currently closer to being 'constant' rather than 'occasional'. In-home care includes services that go well beyond housekeeping and what is "reasonable" must be assessed from the point of view of the needs of the recipient rather than what the payor may think should be paid. The OPCW, and by extension its insurers, should bear this in mind when assessing the reasonableness of receipts submitted for reimbursement by the complainant.

15. Nothing in the foregoing paragraphs should be interpreted as preventing the parties from agreeing to

substitute a lump-sum payment for periodic payment against receipts once the actual amount of “reasonable” expenses has been established. Nor should the present judgment be taken as requiring any reduction in the presently offered monthly payments of 2,400 euros.

*III. Compensation for adaptation to house and car*

16. The complainant claims that the costs for adaptations to his house and car will come to 89,917.45 euros, and that the Organisation took no issue with this calculation provided by him. He therefore seeks this amount as a lump-sum payment.

17. The OPCW submits that this claim falls “outside the heads of claim provided for under the applicable rules”. It submits that it provided the *ex gratia* payment to cover additional requests such as this. The defendant therefore takes the position that if the Tribunal determines that the complainant is entitled to compensation for the adaptations, it should “charge” the 89,917.45 euros sought for adaptations against the 150,000 euros *ex gratia* payment.

18. The defendant’s position is unacceptable. In the first place, whatever inner reasoning the Organisation may have used in deciding on the *ex gratia* payment is irrelevant. In the Tribunal’s view that payment should be seen as being compensation for non-pecuniary loss such as pain and suffering and loss of enjoyment of life and, viewed in the light of the complainant’s dire situation, the amount is neither exaggerated nor unreasonable. More significantly, the expenses of necessary adaptations to house and car are on no different footing than other necessary expenses incurred as a consequence of the complainant’s service-related injury and must be reimbursed.

*IV. Indexing*

19. The complainant submits that since his “disability pension” is not indexed, he will lose purchasing power each year, and that the failure to index his pension does not comply with the obligation of international organisations to provide adequate social protection to their former and serving staff members. The complainant asserts that there is a general principle that a pension (whether for retirement or invalidity) cannot be reduced by inflation to the extent that the purchasing power is eroded to a level that would be considered spoliation. The complainant claims that the United Nations Administrative Tribunal has relied on such a principle in its Judgements 379 and 403.

20. Article 11.1(c) of Appendix D to the Staff Rules of the United Nations states that annual compensation payments shall be “equivalent to two-thirds of [...] final pensionable remuneration”. Article 4.2 of Appendix D contemplates adjustments to that compensation when benefits paid under the Regulations of the United Nations Joint Staff Pension Fund are adjusted in respect of changes in costs of living. By contrast, the OPCW Group Insurance Contract, upon which the defendant relies, explicitly states at Article 18(5) that “all annual compensations are based on the annual pensionable remuneration at the time of the incident and will thereafter not be indexed”. The OPCW Group Insurance Contract clearly states that the complainant’s compensation will not be indexed.

21. In the Tribunal’s view, the above-mentioned cases of the United Nations Administrative Tribunal do not provide the basis for a general principle that benefits must be indexed. Those cases were examining a pension fund that contained a specific clause providing for indexation whereas here there is none.

22. The absence of an indexation clause, however, does not remove the defendant’s obligation to provide the complainant with adequate compensation. The concern that the utility of the award may be reduced through spoliation is very real and could, in times of high inflation, conceivably, have the effect of negating the very purpose of the disability pension which is to make the complainant whole despite his service-related injury. That is only a possibility, however, and the Tribunal is reluctant to order indexation as a matter of routine when the feared spoliation may never occur to an extent significant enough to seriously affect the complainant’s position. Exceptionally, the Tribunal will frame its order in such a way that the complainant may apply at a future date for an adjustment to any ongoing pension payments when and if the purchasing power of such payments has been reduced by at least 10 per cent. Such applications should be by way of request for the execution of the present judgment.

*V. Retroactive payment*

23. The complainant argues that the amounts sought should be paid retroactively. He submits that delays in attempting to negotiate appropriate compensation with the insurers should not have deprived him of compensation while these negotiations occurred.

24. The Organisation submits that the delay in the payment of the compensation package awarded resulted from the need to negotiate with the insurers for lump-sum payments. Moreover, it claims that in order to accommodate the complainant's request for lump-sum payments, he was kept on the payroll during the period of negotiations with the insurers, and therefore received full salary and insurance benefits for nearly a year beyond the date on which he should have been separated.

25. The OPCW also maintains that the complainant cannot have disability payments applied retroactively since the disability benefits only applied once the sick leave benefits expired. The insurers have agreed to retroactively pay home care in the amount of 2,400 euros from 7 August 2003, and such agreement must also apply to any increased amount of such payments resulting from the submission of receipts for the actual and reasonable amounts of home care as detailed in section II above. The corollary of that is that such increased amounts must bear interest from the date the relevant expenses were incurred. Beyond that, and in view of the defendant having kept the complainant on the payroll for longer than would otherwise have been the case, the case for retroactivity has not been made out.

*VI. Other considerations*

26. The complainant claims in his rejoinder that his hands are also being affected by RSD and it appears that such deterioration may have actually occurred since the decision of 7 March 2005 was made. Unfortunately, given the possibly progressive nature of RSD, the condition may continue to deteriorate seriously. The proper route to claim compensation for further losses will be through requests to his employer and via the latter, to the insurers and ultimately the Tribunal. The Tribunal is aware that the Group Insurance Contract states, in Article 18(5), that "the Insurers are not prepared to reopen a file once all parties concerned […] have already agreed on the benefits due" but paragraph 5 goes on to state that the policy will continue to cover a relapse and it may be that any such deterioration would be viewed as due to a relapse. However that may be, the Tribunal asserts unequivocally that the defendant's obligation to pay the complainant reasonable compensation for the results of his workplace injury is a continuing one and is not affected or diminished by the terms of an insurance policy to which the complainant is not a party.

*VII. Costs*

27. The complainant has suffered an apparently banal workplace injury which has produced horrible and lifelong consequences for him. Although the Organisation has made serious and loyal efforts to fulfil its obligations to the complainant, its last offer, contained in the impugned decision, falls short on a number of counts. The complainant is entitled to an award of costs which the Tribunal assesses at 5,000 euros.

DECISION

For the above reasons,

1. The OPCW is ordered to pay reasonable compensation to the complainant for the consequences of his workplace injury. Without prejudice to the generality of the foregoing, the OPCW shall pay the amounts offered in the impugned decision subject to the following modifications.

(a) Reasonable in-home care expenses, to be justified by receipts or other proofs of payment, shall be paid as provided in section II above together with interest thereon as provided in section V above.

(b) The sum of 89,917.45 euros is to be paid as the cost of past and future adaptations to the complainant's house and car without any reduction in the amount of the *ex gratia* payment of 150,000 euros.

(c) If the disability pension payments to the complainant have their purchasing power reduced at any time by 10 per cent or more such payments shall be increased from time to time as required to bring them up to parity with their present day real value.

(d) The complainant shall receive an award of costs in the amount of 5,000 euros.

2. All other claims are dismissed.

In witness of this judgment, adopted on 5 May 2006, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

James K. Hugessen

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 21 July 2006.