

**119th Session**

**Judgment No. 3442**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr R. G. M. V. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 16 August 2012 and corrected on 21 November 2012, the OPCW's reply of 13 March 2013, the complainant's rejoinder of 20 June and the OPCW's surrejoinder of 26 September 2013;

Considering the third complaint filed by the complainant against the OPCW on 8 October 2012 and corrected on 17 December 2012, the OPCW's reply of 25 March 2013, the complainant's rejoinder of 1 July and the OPCW's surrejoinder of 7 October 2013;

Considering the fourth complaint filed by the complainant against the OPCW on 2 May 2013 and corrected on 29 August, the OPCW's reply of 20 December 2013, the complainant's rejoinder of 8 April 2014 and the OPCW's surrejoinder of 11 July 2014;

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 cases and the pleadings may be summed up as follows:

A. Facts relevant to these complaints can be found in Judgment 3235, delivered on 4 July 2013, regarding the complainant's first complaint. Suffice it to recall that, following an extended period of certified sick leave and during an on-going dispute concerning inter alia the complainant's entitlement to disability benefits under the OPCW's

Group Insurance Contract, the complainant did not return to work on a specified date and his appointment was terminated with effect from 18 November 2009. On 19 November 2010 the Director-General confirmed his earlier decision to terminate the complainant's contract on the basis of unsatisfactory service. 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.

Before the delivery of Judgment 3235, by a letter of 1 May 2012 the complainant, who at that time was no longer a staff member, filed a formal complaint of "harassment and discrimination" with the Director-General. His allegations were based on various decisions and acts related, for the most part, to his compensation claim for what he considered to be a service-incurred illness. With respect to the time limit for filing the complaint, he alleged that the last occurrence of harassment was a decision taken by the Director-General on 19 December 2011 whereby the latter had declined to review an earlier decision denying his claim for service-incurred disability benefits. The complainant requested that an investigation into his allegations of harassment be conducted without delay by an independent investigator.

By a letter of 31 May 2012 he was informed that, according to the terms of Administrative Directive AD/PER/42 of 12 December 2006, former staff members did not have the right to file harassment complaints and thus, his complaint was not receivable. Furthermore, the allegations he had raised had already been the subject of extensive review under the OPCW internal mechanisms and were also the subject of on-going consideration by the Tribunal or the OPCW Appeals Council. Therefore, the OPCW would not respond to any further communication from him regarding matters that were before those two bodies. That is the decision impugned by the complainant in his second complaint.

Prior to the events described above, by a letter of 12 May 2010 the complainant asserted that he was entitled to benefits under the provisions of the OPCW's Group Insurance Contract. Specifically,

he claimed benefits under both Article 19 of the non service-incurred death and disability policy and under Article 18 of service-incurred death and disability policy. As set out in Judgment 3235, the complainant had made an initial request for benefits under the OPCW's non service-incurred death and disability insurance policy in 2008.

On 17 June 2010 he was informed that, as the letter of 12 May was considered to be a new claim for service-incurred disability benefits, the Director-General had decided to refer the matter to the Advisory Board on Compensation Claims (ABCC). Following this review ("the first ABCC review") and a recommendation by the ABCC, on 3 August 2010 the complainant was notified that the Director-General had decided that his claim for benefits under the service-incurred death and disability policy was not receivable. The following month the complainant requested a reversal of that decision and asked that the matter be referred to the ABCC for a review of his claim on the merits of the medical evidence. In the event that his requests were not granted he sought a waiver of the requirement to exhaust internal remedies so that he could file a complaint directly with the Tribunal. By a letter of 22 September 2010 he was informed that the Director-General maintained his decision of 3 August and rejected his requests.

On 9 October 2010 the complainant challenged the decision of 22 September before the Appeals Council ("the second appeal"). The internal appeal proceedings for that appeal were subsequently suspended and the Director-General referred the complainant's claim for a service-incurred permanent disability benefit to the ABCC for review ("the second ABCC review"). By a memorandum of 28 April 2011 to the Chair of the ABCC, the Director-General directed the ABCC to follow specific terms of reference in its consideration of the claim. In particular, he indicated that the complainant had explained that his letter of 12 May 2010 could be treated as a new claim related to the deterioration of his medical condition following the arbitration which had preceded the termination of his appointment. Thus, the Director-General considered that the ABCC's review should be confined to the period following the arbitration proceedings. On

2 December 2011 the ABCC informed the Director-General that it could not conclude that 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.

By a letter of 19 December 2011 the complainant was notified that, in light of the ABCC's findings, the Director-General had decided not to review his previous decision concerning the complainant's claim for service-incurred permanent disability benefits. In addition, he had asked the Appeals Council to resume its examination of the complainant's second internal appeal. The complainant's request for a review of that decision was rejected on 13 March 2012.

On 15 March 2012 the complainant filed another internal appeal ("the third appeal") with the Appeals Council in which he sought inter alia a recommendation that the Director-General set aside his decision of 19 December 2011 and resubmit the matter to the ABCC. He also sought moral damages and costs.

In May 2012 the complainant inquired as to the status of his internal appeals and was informed that his second appeal was under consideration and that a panel had not yet been appointed for his third appeal. On 10 July he again inquired as to the status of his appeals and the following day it was explained that his second appeal was being considered and that the related report would be issued by the Appeals Council at the earliest opportunity. On 12 July the complainant made a further inquiry as to the status of his third appeal and was notified that it was currently under consideration. The Appeals Council subsequently joined the complainant's second and third internal appeals. After being so informed, the complainant requested that the Director-General take an immediate decision on those appeals. By a letter of 20 September 2012 he was notified that the Appeals Council would be reminded of the necessity to avoid any undue delay in finalising its recommendations, while still preserving the integrity of the appeals process and the complainant's right to due process.

Prior to the Appeals Council issuing its report, on 8 October 2012 the complainant filed his third complaint with the Tribunal, indicating

on the complaint form that no express decision had been taken on the claim he had notified to the OPCW on 9 October 2010.

The Appeals Council issued its report on the complainant's second and third internal appeals on 6 March 2013. It concluded that the Director-General and the OPCW had complied with the relevant internal rules, regulations and directives in handling the complainant's claims while at the same time making good faith efforts to meet his requests. It recommended that the Director-General dismiss the complainant's allegations that the OPCW was in breach of Interim Staff Rule 1.5.02, Staff Regulation 6.2, Interim Staff Rule 6.2.03, Administrative Directive AD/ADM/13 and the principle of good faith, that he confirm his decision of 19 December 2011 and decline the complainant's request to resubmit his claim to the ABCC for a third time, and that he reject the complainant's claims for material and moral damages and costs.

By a letter of 11 March 2013 the complainant was informed that the Director-General considered that the request contained in the second appeal, i.e. that the complainant's claim be re-submitted to the ABCC, had been granted. In addition, in accordance with the recommendations of the Appeals Council, he had decided to dismiss the complainant's allegations, to maintain his decision of 19 December 2011, and to decline the complainant's request that his claim be resubmitted to the ABCC for a third time. That is the decision the complainant impugns in his fourth complaint.

B. As a preliminary matter, the complainant requests the joinder of his second and third complaints.

On the merits of his second complaint, he submits that he was harassed and discriminated against over several years as a result of actions and omissions on the part of the OPCW's Administration. Such conduct included, but was not limited to, the OPCW's failure to investigate allegations of harassment which he had raised in early 2007, the OPCW's illegal decision not to submit his 2008 claim for compensation to the ABCC for review, thereby violating his right to due process, the OPCW's decision to invoke the dispute procedure

contained in Article 10, paragraph 2, of the non service-incurred death and disability policy, the Administration's "threats" to terminate his employment in the event that he did not report to work on a specified date, the decision to terminate his appointment, and the OPCW's rejection of his claim of 12 May 2010. Referring to the Tribunal's case law, the complainant contends that the aforementioned conduct by the OPCW constitutes repeated psychological aggression that offended and intimidated him. In his view, that conduct went beyond mere negligence or mismanagement and amounts to hostility and ill will.

In his third complaint, the complainant asks the Tribunal to take complete jurisdiction of the matter and to render a decision on the merits of his claim for service-incurred disability benefits. He states that he lodged his related internal appeal on 9 October 2010 and, despite the passage of two years, the OPCW has yet to provide him with a final administrative decision. Thus, there is no chance that a final decision will be rendered within a reasonable time.

He asserts that, contrary to the Director-General's decision of 3 August 2010, his claim of 12 May 2010 for benefits under the service-incurred death and disability policy was receivable. The OPCW acted in bad faith by concealing information from him in 2008 and by taking a decision on his claim in the absence of a review by the ABCC as to whether his illness at that point in time was service-incurred. He lodged his initial claim in February 2008 and in his letter of 12 May 2010 he notified the Administration of his position that the claim was still pending because it had not been considered by the ABCC. Thus, his claim was not new and the four-month time limit for submitting claims set out in Administrative Directive AD/ADM/13 of 13 March 2000 was not relevant. In addition, as his health had deteriorated as a result of the OPCW's actions related to the termination of his appointment, the OPCW was obliged to reopen the matter in accordance with paragraph 7 of Administrative Directive AD/ADM/13. Furthermore, in his view, the Director-General's decision was based on a recommendation flowing from a flawed ABCC process. In particular, some members of the ABCC panel were in a

conflict of interest and had prejudged the claim. Also, the membership of the panel changed during the review process. Lastly, the complainant argues that the OPCW breached Interim Staff Rule 6.2.03, which relevantly provides that staff members shall be entitled to compensation in the event of injury or illness attributable to the performance of official duties on behalf of the OPCW, in accordance with the terms and conditions determined by the Director-General in an Administrative Directive based on the relevant United Nations rules.

In his fourth complaint the complainant submits that the Director-General's decision of 11 March 2013 is tainted by breaches of the Staff Regulations and Interim Staff Rules, discrimination, unequal treatment, prejudice, bias, breach of good faith, and misuse of authority.

He contends that both ABCC reviews were procedurally flawed. In particular, during the first review the membership of the panel changed between its first and second meetings and thus, its recommendations were tainted. Also, in violation of the principles of fairness which have been established by the Tribunal's case law, two of the panel members had prejudged the medical issues. Furthermore, one panel member, Dr K., had been a member of the special advisory board convened in 2009 to consider the proposed termination of the complainant's appointment. The complainant accuses the members of the ABCC of bias and prejudice and asserts that his rights to anonymity and confidentiality were breached.

With respect to the second ABCC review the complainant argues that the Director-General's issuance of terms of reference to the ABCC was a misuse of authority. In addition, the complainant characterises the Appeals Council's conclusions that he had submitted a "new claim" and that the Director-General's referral of the matter to the ABCC for a second review satisfied one of the claims in his second internal appeal as manifestly incorrect. He argues that he was entitled to have his claim considered by reference to the terms and conditions of his employment and that the OPCW's failure to do so constitutes discriminatory unequal treatment. Also, the Administration provided the ABCC with a chronology of events which included confidential information regarding the litigation of the matter and

the arbitration. The provision of this material is not authorised by Administrative Directive AD/ADM/13 and it only served to introduce bias and prejudice into the review process. The complainant contends that the ABCC ignored a medical opinion which he submitted as evidence. Also, the OPCW breached Interim Staff Rule 6.2.03.

In each of his complaints he asks the Tribunal to set aside the impugned decision. He seeks material damages, moral damages in the amount of 100,000 euros, exemplary damages, and legal costs. He also seeks any other relief the Tribunal deems just and proper. In his third complaint he seeks reimbursement for his costs related to his visit to a physician. In his third and fourth complaints he asks the Tribunal to find that he has been in a state of total permanent disability and that he is entitled to the payment of past and future financial benefits for that disability as provided for under the OPCW's Staff Regulations and Staff Rules and its insurance policies, with interest from the due dates.

C. The OPCW does not object to the joinder of the complainant's second and third complaints.

In its reply to his second complaint, the OPCW disputes the receivability of his allegations of harassment, discrimination, psychological aggression, bad faith, and abuse of authority on several grounds. It asserts that the events alleged to have taken place during the complainant's period of employment should have formed the basis of complaints at the time they are alleged to have occurred. Indeed, the complainant failed to exhaust the internal means of redress that were available to him. In addition, his allegations of harassment are time-barred and thus irreceivable pursuant to Administrative Directive AD/PER/42, which provides that a complaint alleging harassing conduct must be submitted within six months of the occurrence of the alleged conduct. Furthermore, in accordance with the Tribunal's case law, a complainant cannot pursue the same claim before different adjudicative bodies at the same time. The complainant's second complaint is based entirely on alleged actions and inactions which are

at the heart of some or all of the internal appeals and complaints which the complainant has filed to date.

On the merits, the OPCW contends that the decision to declare the complainant's harassment complaint irreceivable was lawful and taken in accordance with paragraph 12 of Administrative Directive AD/PER/42. At the time he filed his harassment complaint, the complainant had not been a staff member for 29 months and thus, he did not satisfy the criteria set out in the Directive. Also, he has failed to demonstrate how the alleged acts or omissions constitute harassment as defined by Administrative Directive AD/PER/42. The complainant has made general, unsupported allegations and has failed to discharge the burden of proof in this respect.

The OPCW points out that at no time, either implicitly or explicitly, did the complainant make any allegation of harassment against any OPCW official prior to his letter of 1 May 2012. It denies that its decision not to submit the complainant's initial 2008 claim for a non service-incurred disability benefit to the ABCC for a determination as to whether his illness was service-incurred constitutes moral harassment. Also, the complainant's return to work programme and the subsequent decision to terminate his appointment did not amount to harassment. Lastly, it contends that his claims of abuse of authority, bad faith and psychological aggression are unsubstantiated.

In its reply to his third complaint the OPCW asserts that that complaint is irreceivable on several grounds. First, the complainant did not exhaust the internal means of redress; second, he failed to identify the impugned decision which he asks to have set aside; and third, he has not established any applicable legal basis upon which the Tribunal can take complete jurisdiction of his case.

On the merits, it points out that on 18 February 2008 the complainant requested benefits under the OPCW's non service-incurred death and disability policy. As he subsequently agreed to participate in arbitration and accepted the payments made to him in respect of the aforementioned claim for benefits, he thus legally accepted that his illness was non service-incurred and that it can no longer be characterised as service-incurred. In addition, in accordance

with paragraph 6 of Administrative Directive AD/ADM/13, a new claim for benefits submitted on 12 May 2010 in respect of an illness which occurred as early as March 2007 would be time-barred under normal circumstances. Moreover, the OPCW asserts that there is no evidence that the complainant suffered or suffers from a service-incurred disability or a total or permanent disability. It explains that claims for non service-incurred disability benefits are forwarded directly to its insurer and that staff members making such claims are not entitled to have them reviewed by the ABCC.

The OPCW denies that the ABCC process was flawed. It asserts that the complainant actively participated in that process and he cannot now challenge the terms of reference that were given to the ABCC by the Director-General.

In its reply to the complainant's fourth complaint the OPCW asserts that the medical reports on file do not provide evidence that he suffered or suffers from a service-incurred illness. In addition, neither of his two initial claims for a service-incurred illness contained allegations of harassment.

The OPCW denies that there was undue delay in the internal administrative processes related to the matter, and furthermore, the complainant's second and third internal appeals were properly joined. It also denies that the ABCC review procedures were tainted. With respect to the Director-General's issuance of terms of reference for the second ABCC review, the complainant has failed to point to any statutory provision or administrative directive which was contravened. Thus, his claim of misuse of authority is not proven.

D. In his rejoinders, the complainant maintains and develops his pleas. Regarding the OPCW's challenge to the receivability of his second complaint he asserts that harassment may be proven by pointing to acts that have occurred over a long period of time, and with reference to a continuing lack of due process. In the rejoinder to his third complaint he contends that he submitted his initial 2008 claim under the OPCW's non service-incurred death and disability policy on the basis of advice that he was given by the Administration

and on the understanding that his claim would be considered by the ABCC. In his rejoinder to his fourth complaint he asserts that there were no grounds upon which the ABCC could reject the medical evidence which he provided.

E. In its surrejoinders the OPCW maintains its position in full.

### CONSIDERATIONS

1. The Tribunal finds it convenient to join these three complaints as they are based on similar and related underlying facts and issues and involve the same parties. They are concerned with events and decisions which revolve around claims for compensation and disability benefits in respect of what the complainant alleges is a service-incurred illness.

2. In his second complaint, the complainant states that on 1 May 2012, he lodged a harassment and discrimination complaint, pursuant to Administrative Directive AD/PER/42, for a series of acts by the Administration over several years relating to his compensation claim. The stated general bases for the claim were “unlawful decisions and harassing acts and occurrences which ha[d] been taken to deprive [him] of any social security and other benefits, and which ha[d] been taken based on [his] medical condition (prohibited discrimination) and which have contributed to compounding [his] illness, and caused anxiety to [him] and [his] family members”.

3. By a response dated 31 May 2012 the complainant was informed that the Director-General rejected the complaint as irreceivable on two grounds. One ground was that the allegations in the complaint had been the subject of review under established OPCW mechanisms and were the subject of on-going consideration in the OPCW Appeals Council, or by the Tribunal and, accordingly, the OPCW would not be responding to any further communication concerning those matters. The second ground was that paragraph 12 of Administrative Directive

AD/PER/42 limited the right to file such a complaint to a staff member. Paragraph 12 provides as follows:

“Complaints of harassment may be filed by staff members or by individuals affiliated or having a contractual relationship with the Secretariat such as those on Special Services Agreements (SSA), interns, contractors, consultants, experts, etc. The alleged harasser must be a staff member of the Secretariat.”

The intent of this provision, as gleaned from its plain words, is that only persons who are in a present employment or contractual relationship with the OPCW may file a harassment complaint against another staff member of the Secretariat. The complainant’s last contractual or employment relationship with the OPCW ended in November 2009. Accordingly, he was not a person who was permitted to file a harassment complaint in the OPCW in May 2012.

4. The complainant could have brought a complaint directly to the Tribunal pursuant to Article II, paragraph 6(a), of the Tribunal’s Statute. However, he did not do so within the prescribed time limit, with the result that his harassment claim is time-barred. Additionally, the Tribunal finds that his allegations of bad faith/ill will and discrimination are unfounded on the merits as the complainant has provided no evidence to prove them. In the premises, the complainant’s second complaint is unfounded and will be dismissed.

5. In his third complaint, which was filed on 8 October 2012, the complainant purports to impugn an implied decision by the Director-General arising on 9 October 2010. That would have rendered this complaint irreceivable as it would have been out of time under Article VII of the Statute of the Tribunal. However, in his brief the complainant explains that he filed his complaint with the Tribunal two years after he lodged his internal appeal because up until the time when he filed it he still had not received a response to the appeal, notwithstanding his inquiries.

6. In Judgment 2039, under 4, the Tribunal held as follows:

“Precedent says that the requirement to exhaust the internal remedies cannot have the effect of paralysing the exercise of the complainants’ rights.

Complainants may therefore go straight to the Tribunal where the competent bodies are not able to decide on an issue within a reasonable time, depending on the circumstances (see Judgments 1829 [...], 1968 [...] and the numerous judgments cited therein).

However, a complainant can make use of this possibility only where he has done his utmost, to no avail, to accelerate the internal procedure and where the circumstances show that the appeal body was not able to reach a decision within a reasonable time (see, for example, Judgments 1674, [...] under 6(b), and 1970 [...]). In general, a request for information on the status of the proceedings or the date on which a decision may be expected is enough to demonstrate that the appellant wants the procedure to follow its normal course, and gives grounds for alleging unjustified delay if the authority has not acted with the necessary diligence. However, there are circumstances in which it is unclear whether the procedure has been abandoned or whether the staff member has implicitly consented to the suspension of his appeal in law or in fact. In such cases, the case law says that the staff member must indicate clearly if he wants the procedure to continue. [...]"

7. In short, before the complaint was brought directly to the Tribunal, the complainant had to inform the OPCW of his continued interest in his internal appeal, thus putting it on notice that he wanted the process to proceed. The Tribunal will assume jurisdiction if it appears that a complainant's rights in the internal appeal process have been paralysed.

8. The evidence does not reveal circumstances that show that the complainant's rights were paralysed in the internal appeal process. It reveals the occurrence of a number of involved events that arose out of the complainant's letter of 12 May 2010 to the Director-General. They included the joining of his second internal appeal with his third internal appeal, consideration of those appeals by the Appeals Council, and the issuance of a final decision on those appeals by the Director-General which is the subject of the complainant's fourth complaint before the Tribunal.

9. The evidence shows that in May 2012 the complainant enquired about the panel constituted to consider his second and third internal appeals and that in July 2012 he sought information as to when he could receive the decisions on his internal appeals and

the reasons for the delay. The responses variously indicated that the panels had been constituted to hear the matters, and, by a memorandum dated 9 August 2012, the complainant was informed by the Chairperson of the Appeals Council of the decision to join the appeals. The memorandum also indicated that, in the context of the greater number of documents to be considered and business-related constraints or annual leave requirements, the panel intended to hear the appeals expeditiously and render its recommendations at its earliest possible opportunity. In a letter dated 31 August 2012, the complainant complained to the Director-General that the Appeals Council had not issued its recommendations on the appeals despite his repeated requests. He asked the Director-General to take an immediate decision on the appeals. When the complaint was filed on 8 October 2012 the complainant would have been aware that his case was in the process of consideration by the Appeals Council. The complainant was informed of the Director-General's final decision with respect to his appeals on 11 March 2013.

10. The foregoing circumstances do not suggest that the complainant's rights were paralysed in the internal appeals process. His third complaint will therefore be dismissed as irreceivable for failure to exhaust internal remedies. Additionally, inasmuch as he sought to litigate the third complaint in the Tribunal when the same matter was before the Appeals Council, that aspect of his fourth complaint which arises out of his second internal appeal (of 9 October 2010) challenging the decision dated 22 September 2010 will also be dismissed. It breached the fundamental rule that a litigant cannot pursue the same claim in concurrent proceedings (see, for example, Judgment 2853, under 6).

11. In his fourth complaint, which was filed on 2 May 2013, the complainant challenges the Director-General's final decision of 11 March 2013 whereby the Director-General effectively dismissed the complainant's second and third internal appeals. In the foregoing consideration it was stated that the complaint will be dismissed insofar as it is based on the second internal appeal. It is therefore that aspect

of the fourth complaint that seeks to impeach the impugned decision in respect of his third internal appeal that is now considered. The complainant submits that the decision of 11 March 2013 should be set aside because it is tainted by breaches of the Staff Regulations and Rules, prejudice, bias, breach of good faith and misuse of authority.

12. OPCW's Interim Staff Rule 6.2.03 entitles a staff member to compensation for illness attributable to service that is related to their performance of official duties. The compensation is to be "in accordance with the terms and conditions determined by the Director-General in an Administrative Directive based on the relevant United Nations rules". Administrative Directive AD/ADM/13, which was issued pursuant to Staff Regulation 6.2, established the ABCC as the body to review claims for disability benefits and to make recommendations thereon to the Director-General, who in turn is to make the final decision "regarding the recommendations of the Board".

13. The complainant contends that the Director-General erred when, in April 2011, he issued terms of reference to the ABCC on referral of the matter. He complains, in particular, because the Director-General circumscribed the scope of the review in the terms of reference. It is however necessary to consider the context in which this was done. In his letter of 12 May 2010 the complainant requested the following:

"1. [B]enefits under Article 19 of the non-service-incurred death and disability policy for temporary incapacity since this was recognized by the insurer's doctor as set forth in the 4 July 2008 letter. In my view, these benefits should have been granted despite the outcome of the arbitration procedure since there was no dispute that I was at least 'in a state of temporary working incapacity'; and

2. [B]enefits under Article 18 of the service-incurred death and disability policy or any other article of the policy that may provide benefits; in the letter of 4 July 2008 it is confirmed that the insurer's doctor considered that my temporary incapacity was service-incurred, thus triggering the terms of the service-incurred policy; the OPCW should take the necessary steps to ensure the processing of this outstanding claim be expedited."

The Director-General first referred this claim to the ABCC in 2010.

14. After its deliberations, the ABCC considered two proposals. The first option was to maintain the previous ABCC decision that there was no evidence that the complainant suffered from a service-incurred illness. This received favourable votes from three ABCC members. The other option was to consider the Administration's recommendation that the complainant be asked to clarify his illness and why he believed it to be service-incurred. This received two favourable votes. In the absence of a consensus, the ABCC referred the case to the Director-General for his decision on the two options.

15. Insofar as it is material, the Administration's response in the letter of 3 August 2010 informed the complainant as follows:

"In accordance with the relevant Staff Regulations and Interim Staff Rules, administrative directives and the service-incurred death and disability policy, the ABCC made a recommendation for the consideration of the Director-General. The Director-General has considered the ABCC recommendation and has decided that your claim for benefits under the service-incurred death and disability policy is not receivable."

16. It is helpful to note the advice which the ABCC gave to the Director-General in a memorandum of 9 July 2010 for the context of this decision. The ABCC referred to the complainant's letter of 12 May 2010 as a request that the OPCW consider his illness under its service-incurred death and disability policy. The ABCC noted that, notwithstanding that the complainant's submissions were received outside of the four-month limitation period set out in paragraph 6 of Administrative Directive AD/ADM/13, it did not reach any conclusion concerning the receivability of the claim on the ground that it was time-barred. The ABCC considered the merits of the claim. It assumed that the illness which the complainant asserted was service-incurred was the same illness for which he had claimed non service-incurred disability benefits on 18 February 2008. It further indicated that the decision to advise that the claim for service-incurred illness was not receivable was made, in effect, on the assumption that the claim was

made for the same illness for which the complainant had been awarded and accepted benefits for a temporary non-service-incurred disability. The ABCC found that there was no evidence of a service-incurred illness.

17. It was against this background that, on 22 September 2010, the complainant was notified that the Director-General had confirmed his decision of 3 August 2010. On 9 October 2010 the complainant filed his second appeal, which, having been subsequently joined with his third appeal, eventually led to his third complaint. The internal appeal proceedings related to his second appeal were, however, suspended and the Director-General referred the matter again to the ABCC, with a specific scope for its consideration. The Director-General was clear that he was not re-opening that matter, specifically because of a statement in paragraph 19 of the complainant's rejoinder of 8 March 2011 in the internal appeal procedure, which raised a "new claim". The paragraph stated as follows:

"The letter of 12 May 2010 can also be treated as a new claim following the deterioration in my medical condition following the arbitration which led to the unlawful termination of my appointment."

18. Given the foregoing circumstances, it was lawful for the Director-General to have circumscribed the scope of the ABCC's review as he did. His intention was to determine whether the complainant experienced 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. No provision in Administrative Directive AD/ADM/13, the OPCW's Staff Regulations or Interim Staff Rules or general principles of law precluded limiting the scope of the review in that way in the circumstances. The issuance of the terms of reference was not therefore a misuse of authority in that it circumscribed the scope of the review, as the complainant alleges. The complaint is therefore unfounded on this ground.

19. On 2 December 2011, the ABCC reported to the Director-General that it could not conclude that the complainant had experienced a service-incurred disability which was distinguishable from any previously existing condition or disability. The complainant was so advised in the letter of 19 December 2011, which stated that in light of the ABCC's advice the Director-General had decided not to review his previous decision concerning the complainant's claim for service-incurred disability benefits, and that, accordingly, the Appeals Council was requested to lift the suspension of the complainant's second appeal. The Director-General reconfirmed his decision of 19 December 2011 on 13 March 2012, on the complainant's request for a review. Thereupon, the complainant filed his third internal appeal on 15 March 2012 asking that the decision of 19 December 2011 be set aside and that the matter be resubmitted to the ABCC. This is the aspect of the impugned decision that the Tribunal considers to be within its jurisdiction.

20. The foregoing events reflect a fundamental flaw in that aspect of the impugned decision. The chain of relevant decisions that were maintained or reconfirmed goes back to the initial decision of 3 August 2010 that the requests contained in the letter of 12 May 2010 were not receivable. With respect, that could not properly have been the decision on the referral of the "new claim" that was specifically circumscribed by the Director-General in order that the ABCC consider a discreet issue which had not been considered or determined before. It was therefore necessary for the Director-General to motivate the decision specifically as it related to the "new claim", which had not previously been dismissed as irreceivable. His failure to do so is sufficient ground for setting aside the impugned decision insofar as it was concerned with the complainant's third internal appeal.

21. However, the complainant submits that the impugned decision should be set aside because there were flaws in the ABCC procedures. He contends that members of the ABCC were biased and that they prejudged the medical issues. He insists that the appointment

of certain persons as members of the ABCC violated well-established principles of due process.

22. The complainant makes allegations of bias and prejudgment against Dr K. who was appointed a member of the 2011 ABCC. The Tribunal finds no evidence that casts doubt on the good faith in which Dr K. performed his duties. However, it is observed that he had previously discussed the Arbitrator's report with another member of the ABCC. He had served on the special advisory board that advised the Director-General on the termination of the complainant's appointment in 2009 and the payment of benefits for temporary non-service-incurred disability. He had also served on the ABCC that considered the complainant's claim in 2010. It is observed that, in a communication dated 22 April 2011, the complainant had objected to the appointment of some members of the ABCC. This was mainly on the ground that they had previously expressed views which precluded their participation in the review. He did not at that time object to Dr K. The OPCW informed the complainant, by an e-mail of 12 July 2011, that the ABCC was constituted in line with his earlier request that none of the members who took part in the earlier review and recommendations regarding his earlier claim in 2010 should be on the ABCC for the review of the present claim. His written objection in September 2011 to Dr K.'s membership in the ABCC on the same ground was met with the response that, as Dr K. was a professional medical practitioner, the OPCW was confident that he would assess the new medical evidence in an impartial and objective manner.

23. The Tribunal finds that, consistent with the promise to honour the complainant's request to exclude members who took part in the earlier review in 2010, in light of Dr K.'s participation in all of the processes concerning the complainant's issues and given the complainant's further objection at the commencement of the 2011 ABCC review, Dr K. should have been excluded from membership of the 2011 ABCC out of fairness and the Administration's duty of care and mutual trust to the complainant. These circumstances provide

another ground that vitiates the impugned decision requiring it to be set aside, with an award of moral damages.

24. The complainant has objected to the chronology that the OPCW provided to the ABCC. The OPCW argues that the document was not prejudicial to the complainant as it was expressly stated in a footnote to the document that the chronology was not a legal document and was intended only to assist the ABCC to understand the background of the matter. However, no provision in Administrative Directive AD/ADM/13 or in the OPCW's Interim Staff Rules justified putting the chronology with a summary of the complainant's prior procedures and requests, with decisions in matters that were so intricately related, before the panel that was reviewing his "new claim". Under paragraph 19 of Administrative Directive AD/ADM/13, the ABCC process is for the purpose of determining whether a staff member has suffered compensatory illness and the type and degree of disability. This is expressly to be done on the basis of reports from medical practitioners. This is the "supporting evidence" which is required by paragraph 6 of the Administrative Directive. A chronology to provide the background of the matter was, in the circumstances of this case, inappropriate as it potentially distracted attention from the medical reports. This and the presence of Dr K. on the panel tainted the proceedings. Accordingly, the complaint is well founded on this ground as well, which is also relevant to the determination of the award of moral damages.

25. However, the Tribunal finds that the allegation of delay in the internal proceedings is unfounded as the delay was not unreasonable in all of the circumstances. The allegation of harassment is also unfounded inasmuch as it was not an issue in the complainant's third internal appeal. So too is the allegation that Administrative Directive AD/ADM/13 is not sufficiently similar to Appendix D of the United Nations Staff Rules. It suffices that the Administrative Directive has established procedures to facilitate claims for disability benefits akin to those provided by the United Nations, but integrated into the OPCW's internal systems.

26. The complainant requests that, in the event that the decision impugned in his fourth complaint is set aside, the Tribunal should determine the merits/quantum of the claim rather than remit the matter to the OPCW. The Tribunal however considers that this is a case in which a determination by the appropriate internal bodies is required on a proper application of the relevant rules and in keeping with the findings, particularly those contained in considerations 20, 23, and 24 of this Judgment.

27. In the foregoing premises, the complainant's second complaint is unfounded and his third complaint is irreceivable for failure to exhaust internal remedies and, accordingly, they will be dismissed. To the extent that the complainant's fourth complaint is receivable, it is well founded, and accordingly, the impugned decision dated 11 March 2013 will be set aside to the extent that the Director-General rejected the complainant's third internal appeal of 15 March 2012. By that appeal, the complainant sought to set aside 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 refused to resubmit the matter to the ABCC. The complainant is awarded moral damages in the global sum of 15,000 euros. Exemplary damages will not be awarded as the Tribunal finds no evidence of malice or improper purpose by the OPCW. The complainant will also be awarded 4,000 euros in costs.

#### DECISION

For the above reasons,

1. The second and third complaints filed by the complainant on 16 August 2012 and 8 October 2012 respectively are dismissed.
2. His fourth complaint is dismissed to the extent that it relates to his second internal appeal of 9 October 2010, as indicated in consideration 10 of this Judgment.

3. The impugned decision contained in the letter of the Director-General dated 11 May 2013 is set aside to the extent detailed in consideration 27 of this Judgment.
4. The OPCW shall pay the complainant 15,000 euros compensation for moral injury.
5. It shall also pay the complainant 4,000 euros costs.
6. The matter is remitted to the OPCW for consideration with particular reference to consideration 26 of this Judgment.
7. All other claims are dismissed.

In witness of this judgment, adopted on 14 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ