V. (No. 9)

v.

OPCW

134th Session **Judgment No. 4508**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr R. G.M. V. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 8 January 2021, the OPCW's reply of 20 May, the complainant's rejoinder of 12 August, the OPCW's surrejoinder of 15 November 2021, the complainant's further submissions of 2 February 2022 and the OPCW's final comments of 7 March 2022;

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

Having examined the written submissions;

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 this case are to be found in Judgments 3235 (concerning the complainant's first complaint), 3442 (concerning his second, third and fourth complaints), 3854 (concerning his seventh complaint) and 4298 (concerning his eighth complaint). In Judgment 3854, the Tribunal ordered the OPCW, in agreement with the complainant, to appoint a medical expert to assess whether the complainant had incurred a work-related disability, distinguishable from any previous existing conditions or disabilities, specifically as a result of his treatment by the OPCW during an arbitration process that had taken

place in the period between 4 July 2008 and 18 November 2009. As the parties failed to reach an agreement on the choice of a medical expert, on 17 October 2017 the President of the Tribunal intervened, as contemplated by point 4 of the decision in Judgment 3854, and appointed Professor V. to make that assessment. Dr V.'s report was forwarded to the OPCW in March 2018 for consideration by the Advisory Board on Compensation Claims (ABCC). In July 2018 the ABCC recommended to the Director-General not to accept the complainant's claim for compensation for service-incurred disability, as it considered 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. The Director-General accepted that recommendation in a decision of 20 July 2018, which the complainant impugned in his eighth complaint.

In Judgment 4298 the Tribunal found that the ABCC's recommendation was flawed, and it therefore set aside the decision of 20 July 2018 taken on the basis of that recommendation. The case was remitted to the OPCW 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. On the basis of that recommendation, the Director-General was to take a new decision within 90 days from the public delivery of the judgment.

After having obtained further information from Professor V., the ABCC issued a report on 2 October 2020, in which it again concluded that the complainant had not incurred a disability 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. It therefore recommended that the complainant's claim for compensation for service-incurred disability not be accepted. By a letter of 16 October 2020, the complainant was informed that the Director-General had decided to follow the ABCC's recommendation of 2 October 2020. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award material damages. He claims the payment of past (retroactive) and future benefits for total disability provided for under the OPCW's Staff Regulations and Rules, Appendix D to the United Nations Staff Rules and insurance policies, with interest from due dates. He also claims moral damages in the amount of 25,000 euros, costs, and any other appropriate relief that the Tribunal may deem just and proper.

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

CONSIDERATIONS

1. For over a decade, the complainant has been trying, unsuccessfully, to secure a disability benefit for an illness the existence of which and the disabling effect of which have never been disputed by the OPCW. Initially his claim for the disability benefit was made on the footing that he had suffered a totally disabling non-service incurred illness. He subsequently claimed he had suffered a totally disabling service-incurred illness. Legal issues concerning the complainant's entitlement to a disability benefit have been addressed by the Tribunal in a multiplicity of judgments (see Judgments 3235, 3442, 3854 and 4298). This judgment will be the fifth.

2. By an order of the Tribunal in Judgment 4298, after the Tribunal determined there had yet again been legal flaws in the consideration of the complainant's case by the ABCC, the Tribunal remitted the matter to the OPCW. It did so in order for an ABCC panel to reconsider a report from an expert psychiatrist, Professor V., who had been appointed by the President of the Tribunal on 17 October 2017. It was necessary for the Tribunal to make the appointment because the parties had not been able to agree, as contemplated by orders made in Judgment 3854, on an expert psychiatrist to examine and report on the complainant.

3. In a report dated 2 October 2020, the ABCC recommended to the Director-General that the complainant's compensation claim for service-incurred disability not be accepted. This recommendation was

accepted by the Director-General in a decision of 16 October 2020 which is the decision impugned in these proceedings.

4. In order to establish the factual context in which this judgment is given, it is desirable to recount in some detail events leading to that decision. The first complaint of the complainant in the Tribunal resulted in Judgment 3235 delivered in public on 4 July 2013. The following is the account in the antecedent facts taken from that judgment:

> "The complainant, a Dutch national born in 1954, is a former official of the OPCW who separated from service on 18 November 2009. He joined the Organisation in January 1996 and worked initially under a series of short-term contracts. On 5 August 1996 he was granted a two-year fixed-term contract and with effect from 14 December 1998 he was appointed to the post of Conference Services Clerk at grade GS-4 under a three-year fixed-term contract.
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> On 12 March 2007 the complainant went on certified sick leave. His leave was monitored by Dr R., the Senior Medical Officer of the Health and Safety Branch, who also advised him with respect to his course of treatment. By a letter of 11 October Dr R. informed the insurance broker responsible for the day-to-day administration of the OPCW's Group Insurance Contract, which included a policy covering service-incurred death and disability and a policy covering non service-incurred death and disability, that he had recommended that the complainant seek additional treatment in order to assist him with his return to work. On 13 December 2007 the complainant exhausted his entitlement to sick leave with full pay and was placed on sick leave with half pay.
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> In a letter of 18 February 2008 to the Director of Administration, who was also Chairperson of the Advisory Board on Compensation Claims (ABCC), the complainant stated that he and his treatment providers were of the opinion that he was totally and permanently incapacitated for further work at the OPCW, and he requested benefits under the Organisation's non service-incurred death and disability insurance policy. Two days later, Dr R. wrote to the insurance broker expressing the same opinion and recommending that the complainant be assessed according to the aforementioned policy.
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> At the insurance broker's request, on 4 June 2008 the complainant underwent a medical examination conducted by the insurance broker's own expert, Dr V.d.B. In his report Dr V.d.B. concluded inter alia that the complainant was not 100 per cent disabled but that "he would be for less than 33 %". By a letter of 4 July the insurance broker informed the Administration that Dr V.d.B. had determined that the complainant was temporarily incapacitated for work and that the origin of the incapacity was mainly of a

non-medical nature. In addition, he would be able to perform duties within the OPCW that were reasonably compatible with his abilities, education and experience. On 5 August 2008 the complainant exhausted his sick leave entitlements.

In a letter of 12 September 2008, appended to which was a medical report from Dr R. regarding the complainant's condition, the Director of Administration informed the insurance broker that the OPCW was of the view, based on medical information, that the complainant satisfied the criteria for non service-incurred total permanent disability as defined in the Group Insurance Contract. The Director requested that the matter be reviewed by the insurance broker's Medical Adviser with a view to adopting the Organisation's conclusions. The insurance broker replied on 17 October that a review had been undertaken, but it had been concluded that the complainant was not suffering from a permanent total disability and, consequently, he was not entitled to any benefits under the applicable insurance policy. Later that month, pending the outcome of the dispute, the complainant was placed on special leave with full pay on humanitarian grounds, with retroactive effect from 6 August 2008.

In November 2008 the Director of Administration invoked the dispute procedure contained in Article 10, paragraph 2, of the non service-incurred death and disability policy, which provided for the designation of a medical arbitrator in the event of a failure to settle a dispute related to medical questions. The complainant subsequently signed a submission agreement – the "Arbitration Compromise" – setting out the terms for the arbitration. In his report of 14 April 2009 the arbitrator concluded inter alia that the complainant was not suffering from a permanent total disability.

Having been notified of the arbitrator's findings, the complainant met with Dr R. on 11 May 2009 to discuss the arbitration. That same day he sent a letter to the Administration requesting information about his situation, given that Dr R. had asked him to decide, on the following day, whether he wanted to resume his duties or, alternatively, agree to the termination of his contract. By a letter of 22 May the Head of the Human Resources Branch explained that, as a result of the arbitration, it had been decided that he did not satisfy the criteria to be considered totally and permanently disabled under the Organisation's insurance policy and his claim was therefore not receivable by the insurers. Furthermore, the Director-General had decided to discontinue the complainant's special leave with full pay effective one week from the date of his receipt of the letter, that is, 2 June. He was expected to return to his post as from that date, at which point he would be placed on a structured return-to-work programme under the guidance of the Health and Safety Branch. In the event that he failed to return to work, the Director-General would initiate a termination process under Staff Regulation 9.1(a) and the relevant Interim Staff Rules and Administrative Directives.

During the following weeks the complainant made numerous enquiries with the insurance broker and the Administration which variously related to the arbitration, and his concerns with respect to his return to work and the possible termination of his contract. By a letter of 15 June 2009 the complainant's lawyer asked the Administration to provide detailed information about the proposed return-to-work programme and the complainant's entitlement to an indemnity under Article 19 of the OPCW's death and disability insurance policy, inter alia.

On 29 June 2009 the Head of the Human Resources Branch notified the complainant that, as he had not returned to work as requested, the Director-General had convened a special advisory board (SAB) to consider the proposed termination of his appointment. In a memorandum of 28 September the SAB unanimously advised against termination of the complainant's contract on the basis of his being "incapacitated for further service due to reasons of health", but it further advised that his contract could possibly be terminated in accordance with one or more of the remaining conditions set out in Staff Regulation 9.1(a). In a memorandum of 29 September to the Director-General, the Joint Advisory Board (JAB) indicated that the SAB had submitted its recommendations and that the JAB concurred with the SAB's conclusion and had taken note of its recommendations. By a letter of 20 October the complainant was notified of the Director-General's decision to terminate his contract, with effect from 18 November 2009, in accordance with Staff Regulation 9.1 on the grounds that his services had proved unsatisfactory.

The complainant requested a review of that decision on 13 November 2009, but he was informed by a letter of 1 December that the Director-General had decided to maintain it. On 23 December he lodged an appeal with the Appeals Council challenging the arbitration process which led to a denial of his request for disability benefits and the decision to terminate his contract. In its report of 21 October 2010 the Council recommended that the Director-General set aside the decision to terminate the complainant's contract, reinstate him in his former post, and reconsider the grounds of the termination decision in light of Dr R.'s medical opinion – provided on 15 October – that the complainant could not return to work. By a letter of 19 November 2010 the complainant was informed that the Director-General reconfirmed his decision to terminate the complainant's contract on the basis of unsatisfactory service and that he would not reconsider the basis for that decision. That is the impugned decision."

5. The genesis of the inquiry about disabling illness focusing on the arbitration period (4 July 2008 to 18 November 2009) was explained in considerations 17 and 18 of Judgment 3442, delivered in public on 11 February 2015:

> "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 [in which the Director-General had decided that the complainant's claim for benefits under the service-incurred death and disability policy was not receivable]. 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:
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> > '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.'
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> 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."

6. In its 2 October 2020 report, the ABCC analysed the report of the expert psychiatrist, Professor V., of 14 March 2018 and a supplementary report of Professor V. of 19 September 2020. As discussed in more detail shortly, the latter report was in response to a communication from the ABCC dated 27 August 2020 requesting further information from Professor V. This request was unexceptionable and involved a process contemplated by the observations of the Tribunal in consideration 9 of Judgment 4298.

7. It is convenient, at this point, to recall observations of the Tribunal in Judgment 4298 about the initial report of Professor V. of 14 March 2018, namely that his report is detailed and 23 pages long.

The complainant was assessed by Professor V. for approximately 16 hours and Professor V. was assisted by a colleague who was a doctor in clinical psychology and neuropsychology. Importantly, it was report from a medical practitioner specialised in a field of medicine, namely psychiatry. Professor V. was in this respect an expert. In Judgment 3538, considerations 11 and 12, the Tribunal made the following observations concerning expert evidence in legal proceedings, albeit in the context of evidence of an actuary:

> "11. [...] An actuary is a highly skilled professional who would ordinarily acquire the knowledge to undertake the work of an actuary during years of tertiary study at a high level. The same can be said of engineers in diverse fields of engineering, doctors in diverse fields of medicine and other professionals. Study and experience create expertise.
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> 12. It is often the case that a court will be required to adjudicate on an issue where the opinion of an expert is an essential element in determining the outcome. Obvious examples would be the cause of illness and the prognosis of a staff member claiming some type of sickness benefit or sickness leave. Expert medical opinions would ordinarily underpin a court's determination of whether an entitlement to the benefit or leave was established. It would be in rare cases indeed that a court would determine such issues on the basis of arguments advanced by non-experts in the field in question, however intelligent or knowledgeable they may be in other fields of human endeavour."

8. What then did Professor V. say in his initial and supplementary reports by way of conclusion? On the penultimate page of the initial report (page 22), Professor V. described, correctly, his mandate as being "to 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" identified as "the time period between 4 July 2008 and 18 November 2009". Immediately following was Professor V.'s conclusion. Obviously his conclusion must be read and understood in the context of his description of his mandate. His conclusion was intended to be responsive to that mandate. It was that the complainant did incur a work-related disability which was distinguishable from any previously existing condition or disability. Professor V. then said that before the arbitration period there was some hope in the complainant

that his situation would be resolved. During the arbitration period symptoms of depression became more severe and they did not remit despite medical and psychological treatment. Though expressed in the language of a medical practitioner and not a lawyer, it is quite clear Professor V. was focusing on the effects of the psychiatric conditions the complainant was suffering, and particularly depression, and was saying that it became totally disabling during the arbitration period.

9. As became apparent in its report of 2 October 2020, the ABCC was interested in the time at which the psychiatric conditions of the complainant identified by Dr V. in his initial report (burn-out and depression) were first manifest and whether this was before the arbitration period. This interest led to the ABCC's request of 27 August 2020 to Professor V. Of central relevance was a question to the following effect from the ABCC: the summary on page 22 of the initial report stated that the complainant incurred a work-related disability which was distinguishable from the previously existing condition or disability during the arbitration period, but the report suggests that similar conditions were present before the arbitration period and the ABCC requested clarification as to whether the work-related disability preceded the arbitration process.

10. In his supplementary report of 19 September 2020, Professor V. provided, under a heading "SUMMARY TO THE QUESTION ASKED", an answer to the question summarised in the preceding consideration. In his answer, Professor V. accepted that in March 2008 the complainant had manifest "complaints indicative of burn-out" and that at that time "there was a serious burn-out presentation in which context there was also a severe depressive disorder for which treatment was started". Thus, Professor V. was acknowledging the existence of a condition or conditions which predated the arbitration period. However, importantly and as noted earlier, Professor V. went on to say that: "[b]efore 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." Again, as expressed in the language of a

medical practitioner and not a lawyer, it is tolerably clear that Professor V. was saying that the disabling effects of the complainant's depression could then be viewed as total whereas previously they could not.

11. Before considering the ABCC's report of 2 October 2020, it is desirable to say something about the legal framework in which the complainant's claim was being considered. It is unnecessary to resolve a question raised in the pleas about, amongst other things, whether the relevant United Nations Staff Rules were those promulgated in 2018 or those that preceded them or indeed whether the applicable instrument is, for present purposes, the OPCW insurance policy. That is because they all reflect the basic scheme shortly discussed. For convenience, the Tribunal refers to that scheme as reflected in the 2018 version of Appendix D which is annexed to the OPCW's surrejoinder.

12. Interim Staff Rule 6.2.03 provides that staff members are entitled to compensation in the event of death, injury or illness attributable to the performance of official duties. In the following discussion the Tribunal will refer only to an illness (in this case a psychiatric illness) rather than a death or injury, which have no particular relevance on the facts. That provision says that, in effect, whether such compensation is payable is to be determined by reference to an Administrative Directive based on the relevant United Nations rules. Appendix D to the United Nations Staff Rules of 2018 contains those rules. Article 2.2 of Appendix D declares that the illness underlying the claim must be service-incurred. Article 2.2(d) says that for an illness to be service-incurred, it must be directly attributable to the performance of official duties on behalf of, in this case, the OPCW, in that it occurred while engaged in activities and at a place required for the performance of official duties. Section III deals with compensation. Article 3.2 in that section provides that in the event of total disability (subject to certain pre-conditions which are not relevant in this case) a member of staff shall receive annual compensation as a proportion of her or his last pensionable remuneration and that compensation shall be payable for the duration of the disability. Importantly, for present purposes, whether a staff member is entitled to compensation of this character is determined by answering three questions.

The first question is whether the staff member suffered an illness. The second question is whether the illness was causally directly connected to the work of the staff member. The third question is whether the illness was disabling and whether, for present purposes, it was totally disabling.

13. Central to the reasoning and conclusion of the ABCC was that, to refer to paragraph 9 of its report, the conditions (by which the ABCC was referring to the complainant's burn-out and serious depression) were revealed by Professor V.'s report as having predated the arbitration process. This approach is manifest elsewhere in its report when the ABCC says these conditions were not incurred by the complainant during the arbitration period and later that the onset of the complainant's burn-out and depressive symptoms predated the arbitration period. But by this approach the ABCC was addressing the first and possibly the second question referred to in the preceding consideration. That is to say, the ABCC was apparently accepting there was an illness and asking when the illness was first manifest. But in the present case the critical question is the third question, namely was the illness totally disabling and, if so, when. It would only be at that point that an entitlement to compensation for total disability would have arisen. The OPCW commenced its pleas on this topic in its reply by saying "[t]he ABCC properly exercised its discretion in finding that the [c]omplainant's reported disability pre-dates the arbitration period". The ABCC did not make this finding and this was the very issue it failed to address.

14. While there has been some imprecision of language in the many words written about the circumstances of the complainant and the nature of the benefit he seeks including, it must be accepted, by the Tribunal, the focus now, after over a decade of litigation, must be on the question of whether the complainant is entitled to compensation because he suffered a service-incurred illness which resulted in his total disability and, in the unusual circumstances of this case, whether these combined elements first arose in the arbitration period. The Tribunal finds that the answer to be derived from Professor V.'s report and supplementary report is yes. That is to say, the illness the complainant suffered, while manifest before the arbitration period, became totally

disabling during the arbitration period. Thus, during that period the complainant became entitled to compensation because he was at that time, and not before, totally disabled by his illness and notably his depressive illness.

15. In reaching its conclusion the ABCC erred in focusing, too narrowly, on the time at which the complainant's illness first manifest itself. Necessarily, in acting on its recommendations, the Director General erred in making the impugned decision of 16 October 2020 and it should be set aside.

16. The complainant sought an oral hearing in order to call Professor V. to give evidence. It is unnecessary, having regard to the foregoing, to receive evidence from Professor V. Accordingly the request for an oral hearing is refused.

17. At this point, it is appropriate to address the orders which should be made consequential upon the conclusion in consideration 15, above. One possibility would be to remit the matter to the OPCW yet again to enable a newly constituted ABCC to yet again consider the complainant's request for the benefit. Without resolving a contest in the pleas about whether the ABCC was bound to give effect to the conclusion of Professor V. or whether it had an independent discretion, plainly enough Professor V.'s opinion and conclusion should have been viewed by the ABCC which reported on 2 October 2020 and should be by any future ABCC, as compelling, as discussed in consideration 7 above, at least as regards the medical issue addressed. This consideration coupled with the fact that this litigation in its various manifestations has persisted for over a decade without a resolution of the fundamental issue of the complainant's entitlement to the benefit, point to the need for the Tribunal to take the unusual course, in the interests of justice, of making an order determining the complainant's entitlement. Accordingly, the Tribunal will order that the OPCW take all steps necessary to secure compensation payable to the complainant for an illness which has totally disabled him on and from 18 November 2009, the end of arbitration period. That date is appropriate given that it is not possible

to be more certain about an earlier date during the arbitration period having regard to the conclusions of Professor V. Given the period for which the complainant has not been paid, it is appropriate to order the payment of interest.

18. The scheme of Section III of Appendix D discussed earlier, contemplates the possibility that a totally disabling illness resulting in the payment of compensation might not continue indefinitely disabling the person receiving the compensation. Article 3.2 provides that the compensation is payable "for the duration of the disability". Accordingly, it is conceivable that the totally disabling illness of the complainant identified in the period revealed by the facts of this case has ceased, at some time in the past, or will cease, at some time in the future, to be totally disabling. If a conclusion to that effect was to be reached by the OPCW on a rational, reasonable and objective basis, then the order the Tribunal makes in these proceedings should not be viewed as preventing the Organisation from taking steps based on that conclusion.

19. It is necessary to consider one further issue raised in these proceedings, namely the failure of the ABCC to provide the complainant with a copy of Professor V.'s supplementary report of 19 September 2020. There is a vast body of Tribunal case law which establishes it should have been (see, for example, Judgment 4457, consideration 28, and the cases cited therein). It was relevant to the complainant's case and relied on by the ABCC. There was clearly a breach of complainant's rights and the report should have been provided. Conceivably it could have resulted in a favourable decision by the ABCC based on submissions by the complainant referable to the supplementary report. The complainant is entitled to moral damages which are assessed in the sum of 5,000 euros.

20. The complainant is entitled to costs which are assessed in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The decision of the Director General of 16 October 2020 is set aside.
2. The OPCW shall take all steps necessary to secure the payment of compensation to the complainant for a service-incurred illness which has totally disabled him on and from 18 November 2009, plus interest at the rate of 5 per cent per annum from due dates.
3. The OPCW shall pay the complainant 5,000 euros moral damages.
4. The OPCW shall pay the complainant 8,000 euros costs.

In witness of this judgment, adopted on 25 May 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ