113th Session **Judgment No. 3120**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M.J. L. against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 29 June 2010, the OPCW's reply of 24 September, corrected on 27 September, the complainant's rejoinder of 9 November 2010 and the Organisation's surrejoinder of 4 February 2011;

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, who holds dual Polish and Australian citizenship, was born in 1954. He worked for the OPCW as an inspector from June 1997 to December 2007 and again from February 2008 to January 2009. On 14 February 2007, while on an inspection mission on behalf of the Organisation, he was involved in a motor accident as a result of which he sustained injuries. The Advisory Board on Compensation Claims (ABCC) considered his case on 21 November 2007 and recommended that the complainant's injuries be recognised as service-incurred and that he be fully reimbursed for

all medical expenses resulting from the accident, in accordance with the Organisation's insurance policy for service-incurred disability. The Director-General endorsed this recommendation on 4 December 2007. A medical report on the complainant's condition, prepared by the Head of the Health and Safety Branch, was provided on 14 January 2008 to the insurance broker responsible for administering the OPCW's medical insurance scheme and on 5 February 2008 the insurance broker was apprised of the ABCC's recommendations.

Prior to that, the complainant had requested to see and receive copies of his medical file and records but he was advised that, although he was entitled to have access to certain parts of his medical file, he did not have the right of access to the entire file or the right to receive copies thereof. By a letter of 6 October 2008 the Director of the Administration Division notified the complainant of the ABCC's recommendations and the Director-General's decision to endorse them. Referring to the complainant's request for copies of his medical records, he indicated that the Organisation's practice was to provide staff members with the most recent copies of blood tests, x-rays and other test results but not with copies of medical notes. He added that, although he was willing to discuss with the complainant the medical notes contained in his file and even to provide him with a summary thereof, he would not provide him with copies of these notes or the medical report sent to the insurance broker.

On 14 December 2008 the complainant wrote to the Director-General requesting a review of the decision of 6 October to the extent that it denied his request for full and unlimited access to his medical file and records. He also sought compensation for the increase in his medical insurance premiums. He was informed by letter of 13 January 2009 that his request was being considered. On 31 January 2009 he wrote again to the Director-General informing him of his decision to file an appeal. Without prejudice to his right of appeal, he also requested that a conciliation procedure be initiated in respect of the matters raised in his letter of 14 December 2008. The Director-General agreed to that request and a conciliation procedure took

place from 14 February to 10 July 2009, albeit without success. In his final report of 14 July 2009, the conciliator recommended the discontinuance of the process given that no mutually satisfactory agreement had been reached. The Director-General accepted this recommendation and by a letter of 11 August 2009 the complainant was informed that the conciliation procedure had been officially concluded.

On 9 September 2009 the complainant filed an appeal with the Appeals Council. He requested that he be given unlimited access to his medical file and a full copy of it and that he also be allowed to include in it a note correcting any aspect of it which he deemed inaccurate or misleading. He reiterated his claim for compensation for the increase in his medical insurance premiums and asked the Director-General to expedite the settlement of that claim as well as his pending claims for the reimbursement of medical expenses. The Council submitted its report on 4 March 2010. It recommended that the complainant should pursue his claims with the insurance broker and that the Organisation should stand by its commitment to pay for any medical expenses incurred by him as a result of his accident while on mission and to assist him in drafting his correspondence to the insurance broker.

By a letter of 23 March 2010 – which constitutes the impugned decision – the Head of Human Resources informed the complainant that the Director-General had decided to endorse the Appeals Council's recommendations. He stated that the OPCW would continue to accept responsibility for any increase in the complainant's medical insurance premiums resulting from his service-incurred injuries. With regard to his request for access to his medical file and records, the Head of Human Resources noted that the complainant had already been provided on 11 February 2009 with a summary of his medical file, a verbatim transcript of his medical discharge and a copy of the medical report sent to the insurance broker on 14 January 2008 and that he had also been given the opportunity to access his file during his visit to OPCW headquarters on 6 and 7 July 2009. He added that

the Organisation was still willing to grant him access to his medical file.

On 10 May 2010 the complainant sought clarification as to whether the access granted by the Director-General covered his medical file in its entirety or only parts of it that were considered pertinent. He was advised by letter of 25 May 2010 that he would be allowed to view and read his entire file and to discuss it with a medical officer. He would also be entitled to a comprehensive written summary of all the notes contained therein and to copies of any report provided to the insurance broker or any other relevant third party. Any request for copies of other pertinent records would be considered and, if warranted, provided upon explanation of the purpose for which they had been requested. However, he would not be entitled to receive a copy of the entire file, and in order to exercise his right to access his file he would have to visit the OPCW headquarters in person.

B. The complainant argues that there is no legal basis for the Director-General's decision not to grant him full access to his medical file and records. Indeed, in justifying its decision the Organisation did not rely on any applicable set of rules or legal instrument but merely referred to Administrative Directive AD/PER/40/Rev.1, entitled "Procedures to be Followed and Entitlements on Separation for Staff Members Holding a Fixed-Term Appointment", which in paragraph 55 relevantly provides that "[s]taff members should contact the Health & Safety Branch regarding release of copies of pertinent medical records". This provision, however, simply describes a step in the separation process and is in no way a definitive statement on the right to access medical files. Moreover, the term "pertinent" is not to be understood as authorising the Head of the Health and Safety Branch to determine unilaterally what is pertinent and thus accessible by staff members, but rather as enabling staff members to access anything on their file which pertains to them. Hence, when interpreted according to the ordinary meaning of its terms taken in their context and in light of its object and purpose, paragraph 55 must be seen as allowing staff members unlimited access to all information contained in their medical file.

The complainant points out that in an attempt to justify its refusal to allow him full access to his medical file, the Health and Safety Branch referred to its practice of not providing staff members with copies of medical notes, emphasising that such notes did not belong to patients and were only intended as an *aide memoire* for physicians, who could communicate them to other medical staff with a need to review them. He considers that this practice lacks transparency, not only because it denies staff members the right to know what is on their medical file but also because it entails the risk that inaccurate or misleading information may be communicated to third parties. Moreover, the practice is discriminatory to the extent that it only allows staff members to view their medical file in the presence of a medical officer at the OPCW headquarters. This, he contends, places at a considerable disadvantage individuals who serve in the field or who no longer live in The Hague. In addition, the practice is not consistent with the Tribunal's case law, according to which "it is trite law that a staff member's right to see medical reports may not ordinarily be challenged". Nor is it in line with the pronouncements of the United Nations Administrative Tribunal in leading cases, the International Labour Organization's Code of practice on the protection of workers' personal data or the practice of other intergovernmental organisations.

The complainant asserts that in the absence of a clear set of rules or a legal instrument governing access to medical files in the OPCW, the general principles of the law of the international civil service should apply. These effectively require that staff members be granted access to such files unless cogent reasons dictate otherwise; in that case the burden of proof lies with the Organisation.

The complainant asks that the Organisation be ordered to make available to him a full copy of his medical file, including notes, opinions and diagnoses, without it being necessary for him to travel to the OPCW headquarters in The Hague. He also asks that it be ordered to allow him to write a note for inclusion in his medical file correcting any aspect of it which he considers to be inaccurate or misleading. He seeks 15,000 euros in moral damages and 7,000 euros in costs.

C. In its reply the OPCW submits that the complaint lacks merit, given that the complainant has been granted access to all pertinent medical records in accordance with the Organisation's rules and policy. In particular, he has been provided with copies of pertinent parts of his medical records, including the report submitted to the insurance broker on 14 January 2008, and he has been given the opportunity to read his medical file in its entirety.

The defendant explains that under its policy on access to medical records, which is governed by Article 55 of Administrative Directive AD/PER/40/Rev.1, a staff member only has the right to access medical records and to obtain copies of pertinent parts of the medical file which essentially contain medical information, including results of medical tests, diagnoses and medical reports. It contends that this policy is consistent not only with the Tribunal's case law, but also with the policy of the United Nations, which allows access but at the same time reserves the right to withhold certain privileged information, such as personal notes, observations of physicians or other care providers and administrative materials not related to the diagnosis or treatment of the staff member's condition. It further contends that it is not only reasonable but also appropriate for it to rely on the expertise of the Health and Safety Branch in the formulation of its policy on access to medical records.

The OPCW points out that it has consistently acted in good faith towards the complainant and that it made extensive efforts to find a mutually satisfactory solution to the issues raised by him. Indeed, it offered to provide him full access to his medical file while he was on the Organisation's premises on 6 and 7 July 2009 – his travel expenses to the Netherlands were paid by the defendant – and it also offered him the opportunity to discuss it with the Head of the Health and Safety Branch, which he refused. This offer was in line with the Organisation's policy of granting staff members full access to their medical records in the presence of qualified personnel who can explain their contents and thus prevent misunderstandings or misinterpretations.

According to the defendant, neither the ILO Code of practice on the protection of workers' personal data nor the practice of other intergovernmental organisations is relevant. As for the United Nations Administrative Tribunal, it has not defined the scope of access to medical records or the manner in which this should be granted. Considering that the complainant is not qualified to assess the validity of a medical opinion, much less to correct it, the Organisation invites the Tribunal to reject his claim for the inclusion in his medical file of a written note prepared by him. It states that its offer to provide him full access to his medical records at the OPCW headquarters stands. In the event that such offer is considered impracticable, it affirms, without prejudice to its existing policy, its willingness to send to him copies of his entire medical file.

D. In his rejoinder the complainant accepts the Organisation's offer – made for the first time in its reply – to allow him unqualified access to his medical file by sending him a copy thereof. Relying on the Tribunal's case law, he claims that he had the right to be granted full access to his file, and that the time it took the defendant to grant his request amounts to a denial of due process. Regarding his refusal to discuss his file with the Head of the Health and Safety Branch, he explains that he could not agree to have to justify what he was allowed to see, and he reiterates his claim for inclusion of a note in his medical file correcting any aspect of it which he deems inaccurate or misleading.

E. In its surrejoinder the OPCW indicates that, as the complainant appears to have considered it impracticable to travel to The Hague in order to access his medical file, a full copy thereof was delivered to him on 26 January 2011. It rejects the assertion that the complainant was not afforded due process and submits that the right to have access to medical records cannot be equated with the right to obtain copies thereof. It otherwise maintains its position in full.

CONSIDERATIONS

1. The complainant brought an appeal before the OPCW Appeals Council on 9 September 2009 regarding his right to access and obtain copies of his medical file and a claim for compensation for the increase of his medical premiums as a result of a service-incurred injury of 14 February 2007. On 23 March 2010 the Head of Human Resources notified the complainant of the Director-General's final decision to follow the recommendations of the Appeals Council as set out in its report dated 4 March 2010. Regarding the issue of access to the complainant's medical records, the Head of Human Resources noted that in December 2007 the complainant had been provided with a copy of his most recent blood tests and x-rays and a written summary of the medical information contained in his file, and that in February 2009 he had also received a summary of his medical file, a verbatim transcript of his medical discharge and a copy of the medical report of 14 January 2008 that the Organisation had sent to the insurance broker. He further stated that the complainant had been given the opportunity to access his medical report on 6 and 7 July 2009 and that the Organisation was "still prepared to grant [him] access to [his] medical file". On 10 May 2010 the complainant sought clarification from the Organisation regarding the question of access to his medical file; specifically, he enquired whether he would have access to his entire file or only such parts that were considered pertinent by the Organisation. The Head of Human Resources responded to the complainant by letter of 25 May 2010, stating in relevant part:

> "the Director-General will allow you to view your entire medical file, to read it and discuss it with a medical officer, and to ask any clarification as you see fit.
>
> In addition, you are entitled to a comprehensive written summary of all of the notes in your medical file and you are entitled to copies of any report provided to [the insurance broker] or any other relevant third party. Any request for copies of other pertinent records will be considered and, if warranted, provided upon explanation of the specific purpose of the copies to ensure that these copies are not in any way used out of context.

> With regard to your request for advice as to whether you […] could receive a copy of the full file, you are hereby informed that you are not entitled to receive a copy of the full file. In order to exercise your right to access your medical file, you should visit the [OPCW] headquarters in person." (Original emphasis.)

In light of that response the complainant filed his complaint with the Tribunal on 29 June 2010, requesting inter alia "that he be given full access to his medical file, including a copy of the file, and without the need to travel to the Hague in order to do so".

2. Given that the Organisation has sent the complainant a full copy of his entire medical file (received by him on 26 January 2011), as it offered to do in its reply to the present complaint, the Tribunal considers that that request has been satisfied and that the dispute now only concerns his claim that the Organisation allow him to submit a note for inclusion in his medical file, correcting any aspect of it which in his opinion is inaccurate or misleading, as well as his claim for an award of 15,000 euros in moral damages "for thwarting the complainant from obtaining full access to his medical file for more than three years, thereby preventing him from being able to obtain a complete and accurate picture of the full consequences of his service incurred injury" and for an award of 7,000 euros in costs.

3. The complainant submits that as the Organisation does not have any applicable legal instrument (i.e. a specific rule or regulation) justifying the refusal of unfettered access to one's own medical file, it should be concluded that he had a right of full access, in accordance with the Tribunal's case law and the general principles of law of the international civil service. He notes that the burden of proof rests on the Organisation to justify why full access (including complete copies) cannot be given in specific cases. Additionally, he argues that requiring staff members to go to headquarters in The Hague in order to view their complete medical file discriminates against certain categories of staff by placing an undue burden on those who work in the field, or who do not live in The Hague. The complainant also contends that he should be allowed to include a note in his medical

file, correcting any aspect which he considers to be inaccurate or misleading.

4. The Organisation states that paragraph 55 of Administrative Directive AD/PER/40/Rev.1 of 11 September 2006 sets out its policy regarding access to medical files, which it describes as follows: "[t]he policy of the Organisation, consistent with the jurisprudence of the Tribunal and the policies of most intergovernmental organisations, including the United Nations, on access of staff to medical records is that a staff member or former staff member only has a right to access medical records and to copies of pertinent parts of the medical file which are, essentially, medical related information including results of medical tests and diagnoses and medical reports." Therefore, the Organisation submits that the complainant has at all times been given "full and unrestricted access to his medical records and copies of all pertinent records in his medical file to which he is entitled", in accordance with the Organisation's policy.

5. Administrative Directive AD/PER/40/Rev.1, entitled "Procedures to be Followed and Entitlements on Separation for Staff Members Holding a Fixed-Term Appointment", provides in paragraph 55 that: "[s]taff members should contact the Health & Safety Branch regarding release of copies of pertinent medical records, and to arrange a medical examination on separation if required".

6. The Tribunal is of the opinion that in principle, in the absence of specific rules or regulations governing the right of a staff member to access his or her own medical file, that right must be considered to comprehend the right to view and obtain copies of all records and notes in the file, and to add relevant notes to correct any part of the file considered wrong or incomplete. So stated, that right gives effect to the Organisation's duty of transparency. The judgments cited in this case, particularly Judgments 1684, 2045 and 2047, were interpreted differently by the parties. In Judgment 1684, consideration 7, the Tribunal held that "[s]ince medical records

are strictly personal the staff member's right to see them may not ordinarily be challenged", and it recalled that principle in Judgment 2045, consideration 11, when it ruled that there was "no reason for the complainant to be denied copies of documents that were used by Dr F. in her assessment of the complainant's capability for service". The complainant also refers to Judgment 2047, consideration 13, where the Tribunal stated the following:

> "With regard to the complainant's claim to be provided with copies of any medical reports relied upon by [the insurance brokers], it is trite law that a staff member's right to see medical reports may not ordinarily be challenged. As such, the complainant should be provided with copies of medical reports contained in [the insurance broker's] file relating to this matter. Whether or not the [organisation] has these documents in their possession is irrelevant."

The defendant submits that this case law allows for a staff member to view his or her medical file but does not confer any right to obtain full copies of said file.

7. However, it is clear from those judgments that, while there may be some cases in which it is not advisable to allow staff members to have full access to their medical file at a particular point in time (and the decision to deny access temporarily must be fully justified and reasonable), the right to transparency as well as the general principle of an individual's right to access personal data concerning him or her mean that a staff member must be allowed full and unfettered access to his or her medical file and be provided with copies of the full file when requested (paying the associated costs as necessary). Indeed, paragraph 55 of Administrative Directive AD/PER/40/Rev.1, cited above, does not expressly deal with the right to access, and since the phrase "release of copies of pertinent medical records" refers to records which pertain to the staff member, paragraph 55 cannot be interpreted to mean that the Organisation has the discretion to decide which information in a staff member's medical file is to be considered "pertinent" at the time of the request for copies. It is useful to note that Article 8 of the Charter of Fundamental Rights of the European Union, which entered into

force on 1 December 2009, regarding the "[p]rotection of personal data", relevantly provides that "[s]uch data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law", and that "[e]veryone has the right of access to data which has been collected concerning him or her, and the right to have it rectified". It must be pointed out that the staff member's right to add a note to his or her medical file with a view to correcting any aspect considered wrong or incomplete is consistent with the Organisation's duty of transparency and with the right of that staff member to ensure the accuracy of his or her personal information.

8. In light of the above considerations, the Director-General's decision of 23 March 2010, insofar as it did not allow the complainant access to, and copies of his complete medical file, as well as the opportunity to add a note correcting any aspect that he deemed inaccurate or incomplete, must be set aside. As such, the letter dated 25 May 2010, interpreting that part of the decision relating to access, is considered invalid. The Tribunal will order the Organisation to allow the complainant to submit a note for inclusion in his medical file, correcting any aspect of it which is considered inaccurate or incomplete. Given that the complainant has already received a full copy of his medical report, the Tribunal will order an award of moral damages in the amount of 5,000 euros for the delay between when he first requested full access to his file and when he finally received that copy in January 2011. As the complaint succeeds, the complainant is entitled to costs in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The decision of 23 March 2010, insofar as it did not allow the complainant access to, and copies of his complete medical file, as well as the opportunity to add a note to his file to correct any inaccuracies or omissions, is set aside.

2. The letter of 25 May 2010 is invalid.

3. The OPCW shall allow the complainant to submit a note for inclusion in his medical file, correcting any aspect of it which he deems to be inaccurate or incomplete.

4. The Organisation shall pay the complainant 5,000 euros in moral damages.

5. It shall also pay him 1,000 euros in costs.

6. All other claims are dismissed.

In witness of this judgment, adopted on 9 May 2012, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet