

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

P. (Nos. 1, 2 and 3)

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

121st Session

Judgment No. 3613

THE ADMINISTRATIVE TRIBUNAL,

Considering the first and second complaints filed by Mr J. P. against the Global Fund to Fight AIDS, Tuberculosis and Malaria on 10 January 2013 and corrected on 5 April, the Global Fund's single reply of 22 July, corrected on 26 July, the complainant's rejoinders of 25 October 2013, the Global Fund's surrejoinders of 29 January 2014, the complainant's additional submissions of 21 May on his first complaint, the Global Fund's final comments thereon of 14 August, the complainant's second additional submissions and request for the production of documents of 23 December 2014, the Global Fund's comments thereon of 16 April 2015, the complainant's third additional submissions of 10 June and the Global Fund's comments thereon of 16 July 2015;

Considering the complainant's third complaint against the Global Fund, filed on 14 May 2013 and corrected on 10 July, the Global Fund's reply of 5 November, the complainant's rejoinder of 23 December 2013, the Global Fund's surrejoinder of 8 April 2014, the complainant's additional submissions of 21 May, the Global Fund's final comments thereon of 14 August, the complainant's further submissions of 23 December 2014 and request for the production of documents, the Global Fund's comments thereon of 16 April 2015, the complainant's

third additional submissions of 10 June and the Global Fund's comments thereon of 16 July 2015;

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:

In his first complaint the complainant challenges the decision to terminate his employment for alleged unsatisfactory performance. His second complaint challenges the Global Fund's refusal to retract a News Release published on the date of the termination of his employment, a letter to the Chair of the United States Senate Foreign Relations Committee (USSFRC) and any other communications addressing the circumstances of the termination of his contract and his alleged unsatisfactory performance, as well as its refusal to refrain from making any statements on the matter. In his third complaint, the complainant challenges the decision to maintain the news release on the Global Fund's website and its refusal to award compensation for excessive publication, defamation and continued breach of privacy.

The complainant joined the Global Fund as its Inspector General in January 2008. In late 2010, following investigations carried out by the Office of the Inspector General (OIG), the Global Fund Board (the Board) was informed of instances of misappropriation of grant funds in programs funded by the organization. These irregularities were publicly reported by the OIG and relayed by the media.

These revelations caused concern within the Global Fund as to the adequacy of its fiduciary controls. Accordingly, at its May 2011 meeting, the Board established a High-Level Independent Review Panel (HLP), tasked with reviewing and evaluating the Global Fund's policies, procedures, control systems and oversight mechanisms.

In August 2011, the Board initiated the complainant's first formal performance evaluation, covering the period September 2010 to September 2011.

The HLP presented its final report on 19 September 2011. At its 26 September 2011 meeting, the Board decided to follow the HLP

recommendations and to immediately implement an action plan, which called for the development of a Consolidated Transformation Plan integrating the HLP recommendations and other reform work already underway. The Consolidated Transformation Plan was to be completed for the Board's consideration at its November 2011 meeting.

In January and February 2012, the Audit Unit of the OIG conducted a self-assessment of its activities against the Institute of Internal Auditors' International Standards for the Professional Practice of Internal Auditing. As per the requirements of the Standards, the Audit Unit and the Audit and Ethics Committee (AEC) Chair subsequently engaged an external review team to validate the self-assessment. The AEC asked the external review team to also provide advice on the Audit Unit's mandate within the OIG, its relations with the Investigation Unit, as well as advice on other aspects of its work. A report of its findings ("the EQA Report") was presented at the AEC meeting of 30-31 October 2012, at which time the complainant provided the OIG's comments.

The AEC adopted a statement at its 31 October 2012 meeting to clarify the nature of the relationship between the AEC and the OIG. In an email following the AEC meeting, dated 9 November 2012, the complainant challenged the AEC's characterization of the respective roles and responsibilities of the AEC and the OIG and observed that the statement would benefit from a legal review to bring it in line with the AEC and OIG Charters.

A formal evaluation of the Inspector General's performance commissioned by the AEC in September 2012 was conducted in October and November 2012 by an external company covering the period 1 October 2011 to 30 September 2012. The results of the evaluation were presented in a report delivered on 12 November 2012 (the 2012 Performance Report).

By a letter of 15 November 2012 the Global Fund Board informed the complainant that his contract would be terminated with effect from 28 February 2013 due to unsatisfactory performance. As the applicable notice period was three months, the letter stated that he was released from his obligation to perform work with immediate effect

and that he was required to return his keys, badge, computer, and mobile phone by the next day.

On the same day, the Global Fund published a News Release on its website, announcing the termination of the complainant's employment for unsatisfactory performance. At the same time, the Global Fund emailed the News Release to all its staff. The News Release stated that the Board had made its decision based on "a performance review; an independent external peer review of the audit function; and a report to the Board by its Audit and Ethics Committee".

On 28 November 2012, the Board Chair sent a letter to the Chair of the USSFRC informing him of the termination of the complainant's employment for unsatisfactory performance and stating that the decision had been made based on "a recommendation to the Board by [the AEC]".

By a letter of 12 December 2012 the complainant requested that the Board review its decision to terminate his contract and sought reinstatement in his post. He further asked that the Global Fund cease making any statements regarding his employment and the circumstances regarding the Board's decision to terminate his employment and that it retract the false statement contained in the News Release of 15 November 2012 issued to all staff members and in the letter to the Chair of the USSFRC (as well as any other communications with similar content) indicating that the complainant's employment had been terminated due to "unsatisfactory performance". He claimed damages for the injury caused to his career and professional reputation. In the event that the decision to terminate his contract was not reversed, he sought an award of material damages equivalent to what he would have earned if he had remained employed until his retirement age, as well as 125,000 Swiss francs for the loss of future earning capacity. He claimed 180,000 francs in moral damages for the injury to his dignity and exemplary damages in an equal amount, as well as costs. The complainant also expressed his intention to file a complaint with the Tribunal and requested confirmation that he was not required to exhaust internal remedies.

By a letter of 21 December 2012 the Global Fund Board rejected his claims, on the ground that the information given in the News Release was true. It further indicated that the Board's decision was final within the meaning of Article VII, paragraph 1, of the Tribunal's Statute.

The complainant filed his first complaint on 10 January 2013 against the decision of 15 November 2012. On the same day he filed a second complaint against the decision of 21 December 2012.

By a letter of 5 March 2013 the complainant's counsel asked for confirmation that the letter of 21 December 2012 was to be considered as a final decision. The counsel reiterated his request for the immediate removal of the News Release and argued that the continued posting of the News Release on the Global Fund's website constituted defamation, excessive publication and continuing breach of privacy. He claimed material and moral damages in respect of the continuing violations. The complainant's counsel also requested that the Global Fund produce the AEC report referred to in the News Release and any other document considered by the Board in taking its decision that had not been disclosed to the complainant.

By a letter of 15 March 2013 the complainant was informed that he could challenge the alleged decision contained in the letter of 21 December 2012 directly before the Tribunal. The Global Fund maintained its position that the News Release did not contain any defamatory or false statements, nor did it amount to breach of privacy or excessive publication. The request for production of documents would be entertained only when the Global Fund received the complainant's detailed complaint.

The complainant filed his third complaint on 14 May 2013 against the decision contained in the letter of 15 March 2013 rejecting his requests for the immediate removal of the News Release.

The complainant asks the Tribunal to quash the impugned decisions and to order the production of "relevant documents". He seeks an award of moral damages equivalent to what he would have earned if his appointment had not been terminated and he had served until his retirement date, including all allowances and entitlements,

with interest at the rate of 10 per cent from due dates. He seeks an award of material damages for “loss of enhanced earning capacity for diminished job prospects” in the amount of 125,000 Swiss francs. He further asks the Tribunal to order that any adverse material be removed from his personnel file, to order the removal of the News Release and to order the publication of the Tribunal’s judgment on the Global Fund’s website. He seeks moral damages in the amount of 180,000 francs, additional moral damages for the breach of due process related to the refusal to provide the requested documents, exemplary damages in the amount of 180,000 francs, as well as costs in the amount of 50,000 francs. In his third complaint he additionally asks the Tribunal to award moral damages in the amount of 300 francs per day from 15 November 2012 (date of publication) to the date of removal of the News Release.

The Global Fund argues that the first complaint is entirely unfounded and that the second and third complaints are not receivable, as the letters of 21 December 2012 and 15 March 2013 simply confirmed the decision of 15 November 2012 without adding any new element. It makes a counterclaim for costs.

CONSIDERATIONS

1. The complainant joined the Global Fund as Inspector General in January 2008. At that time the Global Fund was operating under an administrative agreement with WHO pursuant to which the Global Fund staff members were hired under contracts of employment with WHO. Subsequently, this arrangement changed and the complainant entered into an employment contract with the Global Fund as Inspector General effective 1 January 2009. The complainant held an appointment of continuing duration with an expected retirement date in June 2016.

2. The Global Fund’s 15 November 2012 termination of the complainant’s employment for unsatisfactory performance caused the complainant to file three complaints with the Tribunal. Complaint No. 1

challenges the 15 November decision to terminate his employment. Complaint No. 2 challenges the Global Fund's 21 December refusal to retract its 15 November News Release and 28 November 2012 letter to the Chair of the USSFRC (the 28 November 2012 letter), and other communications regarding his termination and the reason for the termination, and its refusal to cease making any statements regarding his employment and the circumstances of the termination of his employment. Complaint No. 3 is directed at the 15 March 2013 rejection of the complainant's request for the immediate removal of the News Release from the Global Fund's website.

3. The complainant and the Global Fund agree that the complaints should be joined. As the three complaints arise from the same facts and given the overlap of the issues, pleadings and the claimed relief, the complaints are joined and will be the subject of a single judgment.

4. The Global Fund does not dispute the receivability of complaint No. 1, however, it does dispute the receivability of complaints Nos. 2 and 3. In relation to complaint No. 2, it contends that the letter of 21 December did not contain a new administrative decision but simply confirmed the earlier decision to publish the News Release and a refusal to remedy the alleged injuries stemming from the publication of the News Release. This argument is rejected. The first complaint was directed at the termination decision and not at the decision impugned in complaint No. 2 in relation to the publication of the alleged defamatory statements in the News Release and the 28 November 2012 letter and the refusal to retract and to cease making the statements regarding the termination of the complainant's employment.

5. The Global Fund also submits that to the extent in complaint No. 2 the complainant seeks to ground a claim for damages beyond the two alleged defamatory actions set out in the 12 December 2012 letter, namely, the News Release and the 28 November 2012 letter, it is irreceivable. The Global Fund takes the position that no administrative decision was ever taken with respect to communications other than the News Release and the 28 November 2012 letter. The

Tribunal rejects the argument that the complainant is attempting to make new claims for damages. In addition to the News Release and the 28 November 2012 letter, the complainant points to alleged defamatory statements in: (a) the article published by the Global Fund Observer on 21 November 2012 based on interviews with Board members; (b) the article issued by the Associated Press on 15 November 2012, quoting statements by the Board Chair and the AEC Chair; and (c) the interview given by the Board Chair to ABC Radio in Australia on 26 November 2012. It appears from the complainant's pleadings that the Global Fund Observer and Associated Press articles are relied upon as evidence of the Global Fund's malicious intent in issuing the News Release. Additionally, it appears that the reliance on the radio interview is to provide a factual foundation for the complainant's claim for increased moral damages on the ground the Global Fund repeated the alleged defamatory statement in the News Release. These are pleas that come within the ambit of the claim advanced by the complainant and are not new claims.

6. In relation to complaint No. 3, the Global Fund submits that the 15 March 2013 letter simply confirmed the earlier decision of 15 November 2012 to publish the News Release and also confirmed the subsequent 21 December 2012 letter in which the Global Fund refused the request to remove the alleged defamatory statement contained in the News Release. As such, it is irreceivable.

7. The complainant contends that in the 21 December 2012 decision the Global Fund stated it would not retract the statement contained in the News Release but did not state anything about maintaining the News Release on the Global Fund's website. Accordingly, the 15 March 2013 decision not to remove the News Release from the website constitutes a new and challengeable administrative decision. As well, the complainant submits that a new cause of action arose for the excessive publication once a sufficient amount of time had passed.

8. It is well settled that a decision which merely confirms a previous one does not constitute a new decision (see Judgment 2011, under 18). The 15 March 2013 letter simply confirmed the 21 December 2012 decision rejecting the complainant's claims and assertions regarding the News Release and addressed the same fundamental issues found in the earlier letter. It did not alter the substance of the earlier decision and it set out the same justification for the position taken on the issue of defamation, namely, the truth and accuracy of the News Release. Moreover, the complainant's position is one based on semantics. It is implicit in the Global Fund's refusal to retract the alleged defamatory statement that it would not take the related action of removing the news release from its website. Accordingly, complaint No. 3 is irreceivable.

9. The Global Fund also raises the timeliness of the filing of complaints Nos. 1 and 2. It submits that neither of the two complaints were filed with the Tribunal within ninety days of the notifications of the decisions. The Global Fund points out that although the complainant submitted the two complaint forms in January 2013, his briefs and evidence were not filed until 5 April. The Global Fund acknowledges that by granting two extensions of time the Registrar permitted the complainant to file his briefs and evidence beyond the ninety-day time limit. However, the Global Fund takes the position that the statutory time limit for filing a complaint is mandatory and cannot be extended by the Registrar or otherwise. The Tribunal has repeatedly rejected this argument in similar circumstances and it is rejected in this case (see for example Judgments 3499, 3419 and 3421).

10. The complainant requests an oral hearing. As the pleas and evidence produced by the parties are sufficient to enable the Tribunal to reach an informed decision, the request is rejected.

11. Turning to the merits of complaint No. 1, the complainant contends that he could not be terminated in the absence of "grave misconduct". The complainant acknowledges that he could be

dismissed by the Board. However, he contends that the Global Fund's By-laws (By-laws) and the Operating Procedures of the Board and Committees (Operating Procedures) do not stipulate the grounds upon which the Inspector General may be dismissed. Without such provisions, the complainant maintains that "unsatisfactory performance" is not a sufficient ground upon which to terminate his appointment. Relying on Judgment 2232, under 16, the complainant submits that the dismissal of an official of his former standing can only be justified on the basis of "grave misconduct" which was not present in his case.

12. The complainant disputes the Global Fund's submission that the By-laws together with the Operating Procedures authorize the Board to terminate his employment for unsatisfactory performance. He adds that allowing the Global Fund's interpretation of its procedures and By-laws would amount to an amendment of the relevant provisions by the Tribunal. The complainant asserts that the Global Fund has deliberately not legislated or provided standards and rules for removing the Inspector General. In support of this assertion, the complainant points out that the By-laws and Operating Procedures provide detailed rules for removing and replacing committee members for poor performance but there are no similar rules applicable to the Inspector General. Lastly, the complainant relies on Judgment 2567, under 5, and Judgment 1755, under 12, to argue that if the Tribunal considers the By-laws and Operating Procedures to be ambiguous, the principle of *contra proferentem* should be applied to resolve the ambiguity in his favour.

13. The complainant's reliance on Judgment 2232 is misplaced as the facts in that case are materially different from those in this case and the decision does not support the proposition being advanced. In that case, under the pressure of one of the State Parties, the Conference of the State Parties at a special session adopted a decision to terminate the complainant's appointment as Director-General with immediate effect. The Tribunal characterized the decision as a "genuine no-confidence motion, with no other basis than the threat

which the complainant's conduct and management posed to the Organisation". It is in this context that the Tribunal, at consideration 16, observed:

"In accordance with the established case law of all international administrative tribunals, the Tribunal reaffirms that the independence of international civil servants is an essential guarantee, not only for the civil servants themselves, but also for the proper functioning of international organisations. In the case of heads of organisations, that independence is protected, inter alia, by the fact that they are appointed for a limited term of office. To concede that the authority in which the power of appointment is vested – in this case the Conference of the States Parties of the Organisation – may terminate that appointment in its unfettered discretion, would constitute an unacceptable violation of the principles on which international organisations' activities are founded (and which are in fact recalled in Article VIII of the Convention, in paragraphs 46 and 47), by rendering officials vulnerable to pressures and to political change. The possibility that a measure of the kind taken against the complainant may, exceptionally, be justified in cases of grave misconduct cannot be excluded, but such a measure, being punitive in nature, could only be taken in full compliance with the principle of due process, following a procedure enabling the individual concerned to defend his or her case effectively before an independent and impartial body. [...]"

14. The complainant's submission that the Board did not have the requisite authority to terminate the complainant's employment for unsatisfactory performance is also rejected. Article 7.4 of the By-laws (in force at the material time) designates the Board as the "supreme governing body of the Global Fund" with the mandate to "select, appoint, assess and, if necessary, replace [...] the Inspector General". Article 34 of the Operating Procedures (in force at the time) provides that the "Board Chair and Vice-Chair, supported by the Coordinating Group, shall ensure that the performance of the [...] Inspector General is assessed each year based on best practices". Moreover, Article 4 of the Charter and Terms of Reference for the Office of the Inspector General (amended November 2009, and in force at the time) (OIG Charter) provides that the Inspector General reports to the Board for "strategic direction, reinforcement and accountability" and the Board retains all powers relating to the Inspector General's "appointment and removal, performance assessment, remuneration, plan of activities and operating budget". While, based on these documents, it is clear

that the Board had the authority to terminate the Global Fund's Inspector General's employment for unsatisfactory performance, the question remains whether the decision to terminate the complainant's employment was lawful.

15. As the Global Fund's position is primarily grounded on its assertions regarding the AEC's Board-delegated authority in relation to the Inspector General and the OIG, an overview of the Global Fund's structure, governance and the mandates of the relevant bodies within the structure is necessary.

16. Registered in Switzerland in 2002 as a non-profit foundation, the Global Fund is a multi-stakeholder international financing institution with privileges and immunities like those of other international organizations in that country. Its stated purpose is to attract, manage and disburse resources that will make a sustainable and significant contribution to the reduction of infections, illness and death caused by HIV/AIDS, tuberculosis and malaria in countries in need.

17. As a result of media reports in January 2011 regarding the misappropriation of grant funds in a number of countries and concerns surrounding the Global Fund's financial controls, the Global Fund undertook a broad review of its systems and governance structures. In particular, in May 2011, the Board engaged a High-Level Independent Review Panel (the HLP) to examine the fiduciary controls and oversight mechanisms of the Global Fund. The HLP presented its final report on 19 September 2011. This report together with other internal reviews led to, among other things, significant changes to the governance and structures of the Global Fund.

18. At its 26 September 2011 meeting, the Board, based on the recommendations of the HLP, decided to immediately implement an action plan. The plan called for the development of a Consolidated Transformation Plan that would integrate other reform work already underway with the HLP's recommendations that was to be completed in time for the Board's November meeting. The Board established the

Coordinating Group with the responsibility of monitoring and tracking the preparation of the Consolidated Transformation Plan. The Board also decided that key actions would start immediately with status reports to be given at the Board's November meeting.

19. These actions included the immediate commencement of the implementation of a number of the HLP's recommendations. Relevantly, to accelerate the implementation of the governance reform process, the Board adopted the HLP's Recommendation 3 with some modifications with effect from 1 December 2011. This resulted in the existing four standing committees of the Board being replaced by three committees: the Strategy, Investment and Impact Committee, the Finance and Operational Performance Committee and the AEC with terms of reference including those duties recommended in the HLP report and as further developed by the Board Chair and Vice-Chair.

20. Before turning to the By-laws in force at the material time, a brief description of the OIG and the role of the Inspector General is useful. The OIG was established in 2005. As stated in its Charter, the OIG is an independent unit of the Global Fund led by the Inspector General. The mission of the OIG is "to provide the Global Fund with independent and objective assurance over the design and effectiveness of controls in place to manage the key risks impacting the Global Fund's programs and operations". The Charter provides that the Inspector General is responsible for "all aspects of the Global Fund's activities including those carried out on its behalf by its programme recipients, partners and suppliers. All systems, processes, operations, functions and activities within the Global Fund are subject to the [Inspector General's] review, evaluation, and oversight."

21. The OIG and the Secretariat are the two administrative bodies of the Global Fund, with the latter under the leadership of the Executive Director, being responsible for the Global Fund's day-to-day operations.

22. In November 2011, the By-laws were amended. It is noted that prior to this time the By-laws did not contain any provisions in relation to the OIG or the Inspector General. In the November 2011 By-laws, the OIG is included in the list of the governing, administrative and advisory bodies. The responsibilities of the OIG found in Article 11 of the By-laws are the same as those in the mission statement in the OIG's Charter. The same Article reiterates the independence of the OIG, that it is led by an Inspector General selected by the Board and that its purpose and function are as stated in its Charter. The role of the Inspector General is not included in the By-laws. However, unlike the provision in the OIG Charter, Article 11 states that the Inspector General reports to the Board through the AEC.

23. The November 2011 By-laws detailed the purposes of the three new standing committees of the Board noted above. In particular, the purpose of the AEC was to provide oversight of (i) the internal and external audit and investigation functions of the Global Fund and (ii) the adherence by the Global Fund and programs financed by it to appropriate standards of ethical behaviour. The AEC's Board-delegated powers and functions are found in its November 2011 Charter. Its functions were divided into three categories: decision-making functions, advisory functions and oversight functions. Relevantly, the AEC's functions included approval of the key performance indicators and methodology for assessing the performance of the OIG, approval of the Inspector General's annual audit and investigation workplan, guidelines, processes and procedures and approval of approaches for the release of the OIG's reports. The AEC's functions included giving advice and recommendations to the Board regarding the scope and mandate of the OIG and for oversight of the OIG including the annual review of the performance of the OIG.

24. Relying on the By-laws and the AEC's Charter, the Global Fund asserts that "the AEC thus exercises broad Board-delegated authority to manage, assess and oversee key strategic components of the work of the Inspector General and his Office". This assertion

resonates throughout its submissions. However, in relation to the Inspector General, this assertion is without foundation. As detailed above, prior to November 2011, the Board's powers in relation to the Inspector General were provided for in the OIG Charter. In November 2011, the Board's powers to select, assess and replace the Inspector General were included in the By-laws. At the same time, the Operating Procedures were also amended and assigned the Inspector General's yearly performance assessment to the Chair and Vice-Chair of the Board as noted at consideration 14, above. The November 2011 By-laws also provided that the Inspector General reports directly to the Board through the AEC. Although under the AEC's November 2011 Charter and subsequent April 2012 Charter, the AEC has various functions in relation to the OIG, there is no reference to the oversight or, in particular, the assessment of the Inspector General. Significantly, although the AEC has advisory functions in relation to the OIG, its functions do not include advising or making recommendations to the Board about the Inspector General's performance. As discussed later, it nonetheless undertook this role and reported to the Board. That report was centrally important in the Board's decision to terminate the complainant's employment. It must also be added that throughout the By-laws and the Global Fund's core documents the position of Inspector General and the OIG are distinct and treated separately. Based on the above review of the relevant provisions in the Global Fund's core documents and in the absence of any documented delegation of this power to the AEC, it is clear that from the time of the complainant's employment with the Global Fund to the date of the termination of his employment the Board was solely responsible for the Inspector General's annual performance assessment.

25. The Global Fund correctly states the standard of review applicable to a decision to terminate a contract for unsatisfactory performance as articulated in the Tribunal's case law. Namely, that a decision to terminate a contract for unsatisfactory performance lies within the discretion of the appointing authority and is subject to limited review. That is, the Tribunal will set aside such a decision if it was taken without authority or shows a formal or procedural flaw or

mistake of fact or law, or if some material fact was overlooked, or if there was an obviously wrong inference drawn from the evidence or misuse of authority. Further, the Tribunal will not substitute its own assessment of a staff member's performance for that of the competent authority.

26. However, the Global Fund relies on this legal framework to submit that the Tribunal's role is not to decide whether the complainant's performance was satisfactory. Instead, the question is whether the Board in the exercise of its authority under the Global Fund By-laws came to a conclusion that could reasonably be supported on the basis of the available evidence such that the decision to terminate the complainant's employment could not be characterized as arbitrary. In this same vein, the Global Fund argues that the complainant bears the burden of proving that the organization had no reasonable basis for its decision. In casting the standard of review in this manner, the Global Fund has conflated the two distinct aspects of the judicial review of the termination of a contract decision. One aspect of the review concerns whether the decision was taken in a way that established one of the limited grounds of review set out at the beginning of consideration 25, above. The other aspect is the assessment of the performance itself. The Tribunal has consistently held that absent manifest error in the assessment of the performance, it will not intervene.

27. It is well settled in the Tribunal's case law that a staff member whose performance is not considered satisfactory is entitled to be informed in a timely manner as to the unsatisfactory aspects of her or his performance so that steps may be taken to remedy the deficiencies. The staff member is also entitled to have objectives set in advance so that she or he will know the basis upon which future performance will be based and that their appointment is in jeopardy if there is no improvement. As well, an organization may not terminate a staff member for unsatisfactory performance unless it has complied with its own rules to evaluate that performance. As stated in Judgment 2414, under 23, "[t]hese are fundamental aspects of the duty of an international

organisation to act in good faith towards its staff members and to respect their dignity”.

28. In support of its assertion that its assessment of the complainant’s performance fully met the requirements in the case law, the Global Fund gives the following account as to what transpired during the relevant time period. In August 2011, the Board initiated the complainant’s first formal performance evaluation. The evaluation was for the period September 2010 to September 2011.

29. In November 2011, the Board held a meeting at which the complainant presented the OIG progress report. According to the Global Fund, in the discussion that followed, criticisms of the Inspector General and members of the OIG were voiced. Certain Board members commented that the conduct of certain members of the OIG had been unprofessional and the tone of reports produced by the OIG was sensationalist. Concerns were also expressed that confidential information contained in the reports of the OIG was sometimes acquired by the press. Prior to the closed executive session that followed, the complainant’s 2011 Performance Survey was made available to Board members. At the closed session where the complainant was not in attendance, the Global Fund claims that there was general agreement among the Board that the performance of the Inspector General was not satisfactory. As a result, it was agreed that the Board leadership would speak to the complainant to inform him of the Board’s performance concerns and require that improvements be made by the next Board meeting in May 2012.

30. According to the Global Fund, in December 2011, the Board Chair met with the complainant in Geneva. The Board Chair emphasized the Board’s dissatisfaction with the mismatch between the complainant’s self-assessment and the overall results of the 2011 Performance Survey. He further mentioned the Board’s concerns with the tone, quality and format of the OIG’s reports. The Board Chair made it clear to the complainant that his performance needed to improve by the Board Meeting of May 2012.

31. In May 2012, the Board had a meeting in which the complainant's performance again surfaced as an area of concern. The Global Fund claims that a majority of Board members, in the closed session, remained concerned by the complainant's performance. Noting no clear steps had been taken by the complainant in the first few months of 2012 to address the performance concerns raised in the 2011 Performance Survey, the Board concluded an increased degree of oversight by the Board would be required. However, the OIG was also commended by a number of Board delegates for improving the OIG's relationships with the Secretariat and implementers. The OIG also received some positive feedback for some of its recent audits. The Board Chair and the AEC Chair met with the complainant after the May 2012 Board meeting to explain that the AEC would work with the complainant to attempt to achieve an improvement in performance. The complainant was informed his performance would again be reviewed by the Board in November 2012. The Global Fund also points out that in August 2011, the Board Vice-Chair had a "frank conversation" with the complainant about his recent unacceptable behavior.

32. Between May and November 2012, the AEC carried out two performance evaluation processes, namely a review of the OIG's compliance with International Standards of Internal Auditing established by the Institute of Internal Auditors (the EQA Report), as well as a review of the complainant's performance in his role as Inspector General. The complainant's performance evaluation was conducted by an external evaluator commissioned by the AEC Chair in September 2012 and was completed on 12 November 2012. This report was presented to the Board members at its 14-15 November meeting that ultimately resulted in the termination of the complainant's employment.

33. In the meantime, between May and the end of October 2012, the AEC and the complainant worked on improving the policy governing the disclosure of OIG reports. At that time a dispute arose concerning the OIG's certification of independence as required for the release of US donor funds. As well, there was an ongoing discussion

between the complainant and the AEC Chair concerning a proposed draft memorandum intended to formalize the working relationship between the OIG and the AEC. Ultimately, on 31 October the AEC unilaterally adopted a statement on the relationship. Subsequently, the complainant challenged the statement's characterization of the respective roles and responsibilities of the AEC and the OIG on the ground that the statement did not accurately reflect the roles and responsibilities in the Global Fund's core documents.

34. The complainant points out that the Global Fund has failed to produce any letter or memorandum from the Board to the complainant advising him that his performance was unsatisfactory, that he was expected to improve within a certain period of time, and that barring improvement his employment would be terminated. He also denies that he was given any oral warnings about his performance in the period preceding the decision to terminate his employment.

35. It is true that an organization's warnings regarding unsatisfactory performance, expected improvements and that the appointment is in jeopardy need not necessarily be in writing. What is required is that the staff member is informed in a timely manner as to the unsatisfactory aspects of her or his service and that the appointment is in jeopardy so steps can be taken to remedy the situation. In some cases, it may be possible to reasonably infer from the surrounding circumstances that some or all of these warnings have been given. With respect to the Global Fund's assertions that the complainant must have known that there were concerns about his performance, at the outset it is observed that criticisms made by individual Board members at Board meetings are simply expressions of those particular Board members' individual opinions. Other Board members may have different views regarding the same matters. What is important for the purpose of this discussion is that the requirements detailed at the beginning of this consideration are the Board's responsibility. These individual comments cannot be taken as the Board exercising its responsibility under the By-laws. The only other times it is alleged that the Board expressed concerns about the

complainant's performance are at the December 2011 meeting between the Board Chair and the complainant, the Board Chair and AEC Chair meeting with the complainant in May 2012 and the Board Vice-Chair's meeting with the complainant in August 2011. With regard to the last mentioned meeting, according to the Global Fund's evidence the discussion concerned the complainant's recent behaviour and does not appear to have touched on any broader issues about the complainant's performance. In the face of the complainant's denial that he was given oral warnings and in the absence of any documentation to that effect neither of the other two conversations could reasonably be understood to be warnings about the complainant's performance which might lead to the termination of his employment, even if the conversations took place. The Global Fund's claim that discussions with top-level officials are not systematically recorded does not relieve the Global Fund of the evidentiary burden of proving that the complainant's due process rights were observed.

Additionally, the Global Fund's submission that in the light of the EQA Report and his "mediocre" scores in the 2012 performance assessment, the complainant could not ignore the possibility the Board may find his performance unsatisfactory and terminate his appointment, is irrelevant. Aside from the fact that this does not amount to a warning by the Board, this position ignores the Board's positive obligation to inform the complainant that his appointment was at risk. Indeed, there is no persuasive evidence that the complainant was ever warned prior to the actual termination of his employment that his appointment was at risk. It is clear that the termination process was fundamentally flawed and on this basis alone requires that the decision to terminate the complainant's employment be set aside.

36. The termination decision itself was also procedurally unfair. As set out above, the Global Fund states that the Board based the termination decision on the 2012 performance appraisal report, the EQA report and the oral report of the AEC. Although the complainant had copies of the 2012 performance appraisal report, the EQA report and he was given an opportunity to make submissions to the Board at

its meeting, the oral report of the AEC was given at the closed session of the meeting that the complainant was not permitted to attend.

37. The Global Fund argues that the complainant was fully aware that the AEC report was given verbally in the form of presentations by the AEC Chair and Vice-Chair at the closed session of the Board meeting. He was familiar with the findings presented by the AEC leadership and he was also aware that the AEC fundamentally disagreed with his views on the appropriate reporting line. Moreover, there was no obligation to disclose the content of the oral report or that it be in written form.

38. In Judgment 3264 the Tribunal made the following observations that are equally applicable to the circumstances in the present case:

“15. Lastly, a question of procedural fairness arises in the circumstances. The Tribunal notes that the complainant was not given a copy of the Reports Board’s report upon which the JAAB relied in making its recommendations and in turn the Director-General relied in reaching the impugned decision. It is well established in the Tribunal’s case law that a ‘staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him’. Additionally, ‘[u]nder normal circumstances, such evidence cannot be withheld on grounds of confidentiality’ (see Judgment 2700, under 6). It also follows that a decision cannot be based on a material document that has been withheld from the concerned staff member (see, for example, Judgment 2899, under 23).

16. Although Article 10.3 of the Staff Regulations provides that the ‘proceedings of the [Reports] Board shall be regarded as secret’, this alone does not shield a report of the Board from disclosure to the concerned official. In the absence of any reason in law for non-disclosure of the report, such non-disclosure constitutes a serious breach of the complainant’s right to procedural fairness.”

39. It is clear from the record that the AEC oral report figured prominently in the Board’s decision. Although he had a copy of the performance appraisal report, the complainant did not know nor could he have known the AEC’s interpretation of the report and its account and reporting of the ongoing tensions between himself and the AEC leadership. More importantly, he did not know that the AEC would

recommend the termination of his contract and he was not given an opportunity to respond. In the circumstances, at a minimum, he should have been provided with a copy of the record of the meeting, with the necessary redactions of privileged information, and an opportunity to respond. The failure to do so effectively precluded the complainant from challenging the substance of the AEC's oral report and the lawfulness of the AEC's role in the termination process. According to the By-laws, Board meetings including those parts of the meetings held in a closed session must be recorded. In the absence of any reason in law for non-disclosure of the recording, such non-disclosure constitutes a serious breach of the complainant's right to procedural fairness and also warrants the setting aside of the termination decision.

40. At this juncture, it is important to note that from the time the AEC became operational in May 2012 there were serious tensions and friction in the relationship between the complainant and the Chair of the AEC and between the OIG and the AEC. It is evident in the record that the Chair of the AEC incorrectly viewed his role as encompassing the Board's responsibilities under the By-laws in relation to the Inspector General. Relevantly, he undertook the responsibility for the complainant's 2012 performance assessment. By inserting himself into and, in effect, managing the 2012 assessment of the complainant's performance, the AEC Chair clearly acted beyond the scope of the authority delegated to the AEC. It was also an abdication on the part of the Board of its obligation under the By-laws to assess the complainant's performance. The fact that the complainant participated in the process does not absolve the Global Fund of its obligations under its own By-laws and core documents. As the Tribunal has consistently held an organization must conduct itself in accordance with the provisions of its own regulatory documents.

41. In these circumstances, a consideration of the complainant's other pleas in relation to the lawfulness of the termination decision is unnecessary.

42. Turning to complaint No. 2, the complainant submits that the 15 November 2012 News Release published on the same day on the Global Fund's website and sent to all staff members by email and the Board's subsequent 28 November 2012 letter stating that the complainant's employment had been terminated for unsatisfactory performance constitute a breach of the Global Fund's duty to refrain from conduct that may harm the dignity and reputation of a staff member and a breach of his right to privacy and a violation of the Global Fund's Documents Policy. Moreover, these actions taken together with subsequent statements made by Board members and the AEC Chair constitute malicious defamation.

43. The Global Fund submits that to determine whether an organization's action harms a staff member's dignity or reputation the circumstances surrounding the action must be taken into account. The Global Fund points to the following circumstances that in its view are particularly relevant. First, the contents of the News Release were accurate. The Board, based on the three reports noted in the News Release, had a reasonable basis for concluding that the complainant had not performed his services satisfactorily. Second, at the time the News Release was published the termination decision was a final administrative decision and not subject to internal means of redress. Third, in view of the nature and importance of his position as Inspector General, the complainant could not expect the same degree of privacy as lower level officials operating in a purely private capacity. Fourth, even if a News Release had not been issued, the complainant's termination would have been discussed in the press. To avoid speculation, the Global Fund had to be transparent regarding the reason for the complainant's departure and that it did not reflect a shift in the Board's commitment to an independent and strong OIG. As well, an "objective" press release was necessary to counter concerns that the complainant would use the media to give publicity to his accusations concerning the Board leaving only the complainant's version available to the public to explain the reasons for his termination.

44. The Global Fund stresses that the information in the News Release was limited to the minimum necessary to avoid the public speculation about the reason for his termination and was drafted in a “sober and factual tone”, without any details regarding the complainant’s performance. The minimum information disclosed was consistent with the complainant’s right to privacy as a top executive with the Global Fund. The complainant’s right to privacy was not breached and there was no violation of the Documents Policy.

45. The Global Fund also submits that there is no basis upon which to conclude that the News Release constituted “malicious defamation” given that the surrounding circumstances (noted in consideration 44, above) show that the News Release was not intended to harm the complainant’s reputation or dignity and the complainant was given an opportunity to be heard before the termination decision was taken. Additionally, he was given an opportunity to meet with the Board to discuss the content of the News Release; however, he chose not to attend a scheduled meeting.

46. It is well established in the Tribunal’s case law that “international organisations are bound to refrain from any type of conduct that may harm the dignity or reputation of their staff members” (Judgment 2861, under 91; see also Judgments 396, 1875, 2371, 2475 and 2720). In this case, there can be no doubt that the announcement in the News Release and the statement in the 28 November 2012 letter that the complainant was terminated for unsatisfactory performance conveyed to readers that the complainant was incompetent and unfit to perform the duties of the Inspector General. These communications were a serious affront to the complainant’s professional reputation and his dignity. The fact that the Global Fund sent an email to its staff members directing their attention to the News Release in circumstances where the complainant was not in a position to refute its contents further exacerbates the breach. It also constitutes a serious infringement of the complainant’s right to privacy. As stated in Judgment 2861, under 92, “[i]t is of the essence of a publication that reflects adversely on a person that it infringes on his or her privacy”.

47. As noted above, the Global Fund attempts to excuse its conduct on the basis of particular circumstances. At the outset, it is observed that the Global Fund's characterization of the termination decision as a final administrative decision not subject to the internal means of redress is based on its own interpretation of the Global Fund's rules regarding internal appeals. When the Global Fund was notified of the complainant's intention to challenge the termination decision, the Global Fund took the position that since the internal appeal mechanism did not apply to the complainant by reason of his former status, the termination decision was a final decision within the meaning of the Tribunal's Statute and the complainant could proceed directly to the Tribunal. It is not necessary to determine whether the Global Fund was correct in taking the position that the internal appeal process did not apply to the complainant. Even if the position can be said to be correct in law, to say that the accuracy of the content of the News Release and the letter were established when they were issued is wrong. The Global Fund knew or ought to have known on 15 November 2012 at the time the News Release was published that the decision and the reasons for the decision would almost certainly be subject to judicial review, with the prospect that the decision could be set aside. If so, there would have been no decision (in the sense of a lawful decision) to terminate the complainant's employment.

48. The Global Fund's assertion that given the nature and importance of the Inspector General position there would be a lesser expectation of privacy is rejected. It is true that a person holding that type of position will always be in the public view; however, it does not follow that there is a lesser expectation of privacy in matters of a personal nature such as performance assessment that reflects adversely on the individual.

49. The fact that the complainant's termination would have been newsworthy is of no moment. Furthermore, the concern regarding the Global Fund's commitment to an independent and strong OIG could have been equally well addressed in a news release announcing the complainant's departure in neutral terms. The possibility that the

complainant may have used the media to give publicity to his version of events surrounding his termination does not justify the pre-emptive issuance of a publication that had the effect of causing injury to the complainant's reputation and dignity. This is something that could have been addressed if and when it occurred.

50. The Tribunal concludes that there was no reasonable justification for stating in the News Release that the complainant was terminated let alone that he was terminated for unsatisfactory performance. In the circumstances, the Global Fund should have simply communicated the complainant's departure in neutral terms, such as, an announcement that the complainant was leaving the Global Fund. However, the complainant has failed to show that the communications amounted to malicious defamation. Other than the assertion that the Global Fund intended to "blackball" him for jeopardizing the United States funding, there is no evidence to ground the complainant's submission that the publications were issued with malicious intent or intentionally designed to destroy his career.

51. According to the complainant, his numerous attempts to find employment with the World Bank, UNDP, NGOs and through recruitment agencies have all failed. He also points out that even if the News Release is removed from the Global Fund's website, his name will continue to be linked to his termination for unsatisfactory performance on the internet. Based on the information provided to the Tribunal it is evident that the Global Fund's actions in publishing the termination of the complainant's employment and the reason for the termination and its refusal to remove the offending information from its website caused serious and irreparable harm to the complainant's reputation and dignity and were a breach of his right to privacy. This entitles the complainant to an award of moral damages as does the unlawful termination of his employment in the total amount of 150,000 Swiss francs.

52. The complainant is also entitled to material damages for the unlawful termination of his employment. The Global Fund will be

ordered to pay the complainant material damages in an amount equivalent to the salary, benefits and other emoluments to which he would have been entitled from 28 February 2013 to the date of his anticipated retirement in June 2016 had he remained in service less the complainant's net earnings from other sources in that period together with 5 per cent interest from 28 February 2013 to the date of payment. The Global Fund will also be ordered to pay the complainant costs in the amount of 15,000 Swiss francs. The Global Fund's counterclaim for costs will be dismissed.

DECISION

For the above reasons,

1. The Board's 15 November 2012 decision is set aside.
2. The Global Fund shall pay the complainant material damages in an amount equivalent to the salary, benefits and other emoluments to which he would have been entitled from 28 February 2013 to the date of his anticipated retirement in June 2016 had he remained in service less the complainant's net earnings from other sources in that period together with 5 per cent interest from 28 February 2013 to the date of payment.
3. The Global Fund shall pay the complainant moral damages in the amount of 150,000 Swiss francs.
4. The Global Fund shall pay the complainant costs in the amount of 15,000 Swiss francs.
5. Within seven days of the public delivery of this Judgment the Global Fund shall remove the News Release from its website.
6. All other claims are dismissed as is the Global Fund's counterclaim for costs.

In witness of this judgment, adopted on 4 November 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ