

**S.**

**v.**

**Global Fund to Fight AIDS, Tuberculosis and Malaria**

**122nd Session**

**Judgment No. 3682**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. E. S. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter “the Global Fund”) on 9 July 2013 and corrected on 21 August, the Global Fund’s reply of 18 December 2013, the complainant’s rejoinder of 7 April 2014 and the Global Fund’s surrejoinder of 14 July 2014;

Considering Article II, paragraph 5, 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 terminate his appointment for gross misconduct.

The complainant joined the Global Fund in 2003. He was involved in a personal relationship with a colleague, Ms Z., for a number of years. Ms Z. was also his supervisor in 2008-2009. Their relationship ended in the summer of 2011.

On 4 June 2012 Ms Z. filed a formal complaint of harassment against the complainant with the Human Resources Department. By a letter of 7 June the complainant was informed that Ms Z. had brought allegations of harassment and unwanted conduct against him. The letter underlined that the behaviour he was accused of constituted gross misconduct which could lead to disciplinary action. In view of the

seriousness of the complaint, a formal investigation would be conducted and, pending the outcome of the investigation, the Administration had decided that the complainant should work from home. A copy of Ms Z.'s letter setting out her allegations was attached to the letter of 7 June.

The investigation was carried out by an external investigator who interviewed 10 witnesses, as well as Ms Z., her son and the complainant. In his report dated 10 August 2012, the investigator found that the evidence gathered during the investigation had substantiated some of Ms Z.'s allegations and that the complainant had engaged in harassment. The investigator recommended that a disciplinary procedure against the complainant be initiated. On 24 August the complainant was invited to submit his comments on the charge of harassment and the investigation report, following which he would be invited to a disciplinary hearing. The complainant's legal counsel submitted detailed comments on 7 September 2012. A number of the findings made in the investigation report were contested, as well as the investigator's reporting that the complainant had admitted to having harassed Ms Z. and his characterization of the facts as harassment.

On 17 September 2012 the complainant was heard by a Disciplinary Panel comprising two senior staff members. Hearing notes were subsequently produced by one of the Panel members.

By a letter of 4 October 2012 the complainant was informed that the Disciplinary Panel had concluded that no new information had come to light during the hearing, that the allegations against him had been substantiated and that he had engaged in harassment amounting to gross misconduct. The letter stated that the General Manager had decided to apply the sanction of dismissal and that it constituted notice of the termination of the complainant's employment. He was paid three months' base salary in lieu of notice.

The complainant submitted an appeal to the Appeal Board on 3 December 2012. The Global Fund filed a response on 21 February 2013. A hearing was held on 13 March. In its report of 28 March 2013 the Appeal Board recommended dismissing the appeal as unfounded. It also recommended that the complainant's claim for costs be rejected, on the ground that the internal appeal process was not judicial in nature

and that it therefore did not entertain any claims for reimbursement of legal fees. By a letter of 11 April 2013 the complainant was informed that the Executive Director had decided to follow the Appeal Board's recommendations. That is the impugned decision.

The complainant asks the Tribunal to quash the decision to terminate his appointment, to order his reinstatement in a similar capacity as last held without delay, and to order the Global Fund to issue a formal acknowledgment that his termination was improper. He seeks material damages, moral damages in the amount of 200,000 Swiss francs and an award of costs, with interest at the rate of 8 per cent per annum on all amounts awarded. In his rejoinder the complainant asks the Tribunal to order the defendant to provide a copy of the applicable Human Resources Regulations and the rules relating to harassment.

The Global Fund requests the Tribunal to dismiss all the complainant's claims as unfounded.

#### CONSIDERATIONS

1. The complainant joined the Global Fund in June 2003 and occupied various positions until his appointment as Senior Program Officer within the Grant Management Division in 2009. He occupied this position until his appointment was terminated on 4 October 2012 for harassment amounting to gross misconduct.

2. On 4 June 2012 Ms Z. submitted a formal complaint of harassment against the complainant alleging that he: continuously sent her messages and notes; placed presents on her work desk; repeatedly placed unwanted calls to her from his private and work phones; frequently solicited information from colleagues as to her whereabouts and then showed up at her locations; and physically threatened her during a staff farewell party on 31 May 2012 and then waited for her at her home following the party. In the complaint, Ms Z. stated that she had been in a three-year relationship with the complainant which ended in July 2011. On 7 June 2012 the complainant was notified of Ms Z.'s allegations and that a formal investigation had been initiated. The

complainant was also informed that he would be required to work from home with full pay and benefits pending the outcome of the investigation.

3. On 10 August 2012 the external investigator tasked with conducting the investigation issued his final investigation report. The report stated there was evidence to establish that the complainant had: (a) slept in Ms Z.'s car on the night of 19-20 August 2011, entered Ms Z.'s home at about 7.30 a.m. on 20 August 2011, approached her in the bathroom while she was showering and then pushed and threatened her; (b) sent Ms Z. unwanted messages and notes, put pictures and presents on her work desk, and called her on the telephone day and night; (c) talked about his relationship with Ms Z. to work colleagues; and (d) waited for Ms Z. at her home following a staff farewell party on 31 May 2012.

4. In light of the findings of the investigation report, a formal disciplinary process was initiated. On 24 August 2012 the complainant was given a copy of the investigation report for his comments, which his legal counsel provided on 7 September 2012. A disciplinary hearing took place on 17 September 2012 before a panel consisting of two management representatives. On 4 October 2012 the complainant was informed of the decision of the General Manager (the acting Executive Director) to dismiss him for harassment amounting to gross misconduct. On 3 December 2012 the complainant challenged his dismissal before the Global Fund's Appeal Board. The Appeal Board recommended that the complainant's appeal be dismissed. On 11 April 2013 the complainant was informed that the Executive Director endorsed the recommendation of the Appeal Board and confirmed the termination of his employment. This is the impugned decision.

5. In his rejoinder, the complainant submits the Global Fund erred in law by applying the wrong regulations and rules to his case. Specifically, he claims the regulations used in adjudicating his case were issued in August 2012, however, the complaint of harassment was formally submitted to the Global Fund in June 2012. As such, the regulations relied on were not in place at the time of the alleged

behaviour and it was the previous version of the Human Resources Regulations that were applicable to the issue of harassment. The complainant also asks the Tribunal to order the Global Fund to provide him with a copy of the applicable regulations and any other provisions regarding the issue of harassment in effect in June 2012. On this last point, as the requested documents were annexed to the Global Fund's reply and form part of the record, the request has already been fulfilled.

6. The complainant's assertion that the Global Fund applied the wrong regulations and procedures is incorrect. The complainant acknowledges that at the time the harassment complaint was lodged on 4 June 2012, the relevant regulations and procedures applicable to his case were the Human Resources Disciplinary Regulation and Human Resources Disciplinary Procedure, as well as the Bullying and Harassment Procedure. It is observed that both the 10 August 2012 covering letter from the investigator to the Head of the Human Resources Department and the investigation report of the same date refer to the "Disciplinary Procedure". In particular, both recommend that "pursuant to Paragraph 5.14.1 of the Disciplinary Procedure, the process against [the complainant] should continue in accordance with Section 6 of the Procedure". It is also noted that in the Appeal Board's report reference is made to Annex 1 of the Disciplinary Procedure.

7. The complainant contends that the Appeal Board's recommendation and the impugned decision are tainted by errors of fact that warrant the quashing of the decision. The complainant maintains that the reply incorporates allegations that were disproven, overstates the evidence and fails to provide any clarity on which instances were considered to be serious instances of harassment.

8. The standard to be applied when considering an alleged mistake of fact by an internal body which has heard evidence and made factual findings is well settled in the case law and was recently reiterated in Judgment 3593, consideration 12. It states:

“Additionally, the Tribunal has consistently stated, as in Judgment 2295, under 10, for example, that it is not the Tribunal’s role to reweigh the evidence before an investigative body which, as the primary trier of fact, has had the benefit of actually seeing and hearing many of the persons involved, and of assessing the reliability of what they have said. For that reason such a body is entitled to considerable deference. So that where in the present case the Investigation Panel has heard evidence and made findings of fact based on its appreciation of that evidence and the correct application of the relevant rules and case law, the Tribunal will only interfere in the case of manifest error.”

Relevantly, in the same case, in consideration 13, the Tribunal also observed:

“The Tribunal finds that this is a case in which the Investigation Panel fell into manifest error when it found that the complainant was not harassed. That error was adopted by the Appeals Committee when it accepted that Panel’s findings and recommended that the complainant’s claim for compensation for harassment be dismissed. Consequently, the Director-General erred by accepting this recommendation in the impugned decision.”

9. The present case is somewhat analogous to the case in Judgment 3593. In this case, the Disciplinary Panel found that no new information had come to light during the course of its hearing and accepted the findings of fact in the investigation report. The Disciplinary Panel concluded that the allegations against the complainant had been substantiated and that he had engaged in harassment amounting to gross misconduct. Subsequently, the General Manager imposed the sanction of dismissal on the strength of the conclusions reached by the Disciplinary Panel. In the internal appeal, the Appeal Board found no basis on which to disturb the findings of fact in the investigation report and the Executive Director endorsed the findings of the Appeal Board and accepted its recommendations. Thus it can be seen that the impugned decision is based on the findings of fact in the investigation report. However, the complainant has failed to establish a manifest error of fact in the investigation report warranting the intervention of the Tribunal. As the record shows, the factual findings of the investigation report were reached following a thorough review of interviews carried out between the external investigator and thirteen witnesses with direct knowledge of

the facts in the case. Consequently, it cannot be said that the decision to dismiss the complainant suffered from a manifest error of fact.

10. The complainant submits the impugned decision was based on improper investigative procedures. Specifically, the complainant contends that he was denied the opportunity to participate meaningfully in the investigative process, which led to a skewed and improper decision. He takes issue with the fact that he was never given an opportunity to attend any of the witness interviews and to participate in the examination of evidence. Additionally, the complainant submits the Global Fund failed to comply with Human Resources Regulation Clause 340.3, which requires it first to employ the use of informal conflict resolution mechanisms before taking any further steps. This last contention is without merit. Human Resources Regulation Clause 300 entitled “Disciplinary”, in relevant part, reads:

“330 Definitions

[...]

330.2 Gross Misconduct

Serious breaches of any of the Global Fund polices, regulations and procedures, which could lead to summary dismissal, including (this list is not exclusive or exhaustive):

[...]

Bullying and/or harassment;

[...]

340 Principles

[...]

340.3 Minor allegations and/or breaches of conduct will first be discussed informally in an attempt to reach resolution.

340.4 Allegations of misconduct or gross misconduct will be fully investigated in line with the disciplinary procedures and the employee given an opportunity to respond.

[...]”

11. It is clear that the informal conflict resolution mechanism found in Human Resources Regulation Clause 340.3 only applies to

minor allegations and/or breaches of conduct and not to allegations of harassment amounting to gross misconduct.

12. In support of his argument that he was denied due process at the investigation stage, the complainant relies on Judgment 2254, consideration 6. It states:

“[B]efore deciding a disciplinary sanction, an organisation should inform the person concerned that disciplinary proceedings have been initiated and should allow him ample opportunity to take part in adversarial proceedings, in the course of which he is given the opportunity to express his point of view, put forward evidence and participate in the processing of the evidence submitted in support of the charges against him [...]”

13. However, as the Tribunal held in Judgment 2771, consideration 14, that statement relates to the situation where disciplinary proceedings have been initiated and does not apply at the investigation stage. The Tribunal discussed the content of due process rights in the context of an investigation in Judgment 2771, consideration 15. It reads:

“The general requirement with respect to due process in relation to an investigation – that being the function performed by the Investigation Panel in this case – is as set out in Judgment 2475, namely, that the ‘investigation be conducted in a manner designed to ascertain all relevant facts without compromising the good name of the employee and that the employee be given an opportunity to test the evidence put against him or her and to answer the charge made’. At least that is so where no procedure is prescribed. Where, as here, there is a prescribed procedure, that procedure must be observed. Additionally, it is necessary that there be a fair investigation, in the sense described in Judgment 2475, and that there be an opportunity to answer the evidence and the charges.”

14. Thus and so far as is relevant to the arguments advanced by the complainant, the only issues are whether the investigation was conducted in a manner designed to ascertain all relevant facts, whether he was given an opportunity to test the evidence against him and to answer the charges against him (see Judgment 2771, consideration 16). Contrary to the arguments advanced by the complainant, the investigative process did not fail to meet this standard. In accordance with paragraph 5.8 of the Human Resources Disciplinary Procedure, at the outset of the investigation the complainant was notified in writing by the Head of



Human Resources of the alleged gross misconduct and provided with a summary of his rights and obligations under the Disciplinary Regulation and Procedure. As part of the investigation, the complainant was given the opportunity to be heard, to respond to the allegations against him and to provide his version of events. Pursuant to Section 6 of the Disciplinary Procedure, following the issuance of the investigation report, the Senior Human Resources Business Partner provided the complainant with a confidential memorandum setting out the allegations made against him; provided him with a copy of the investigation report and all associated attachments; and invited the complainant to comment on the charges against him and the investigation report. The complainant subsequently provided a detailed written response through his legal counsel on 7 September 2012. In accordance with Sections 6 and 7 of the Disciplinary Procedure, the complainant attended a disciplinary hearing where he was provided a further opportunity to respond to the allegations against him, rebut any evidence and explain his actions. Notes of this meeting were taken and provided to the complainant. In keeping with Section 9 of the Disciplinary Procedure, the complainant was given the opportunity to appeal his dismissal decision through the Global Fund's internal Appeal Board, which provided him with yet another process to present his position.

15. The complainant also incorrectly takes the position that his due process rights were breached because he was not permitted to attend the witness interviews and participate in the examination of the evidence. Addressing a similar submission in Judgment 2771, consideration 18, the Tribunal held:

“The complainant points to cases in which the Tribunal observed that the complainant had not been present when statements were taken and not given the opportunity to cross-examine witnesses (for example, Judgments 999 and 2475), to object to evidence (for example, Judgment 2468) or to have a verbatim record of the evidence (for example, Judgment 1384). These are matters that, in the cases concerned, would have ensured that the requirements of due process were satisfied. However, they are not the only means by which due process can be ensured. In the present case, the complainant was informed of the precise allegations made against him [...], and provided with the summaries of the witnesses' testimonies relied upon by the Investigation Panel, even if not verbatim records. He was able to and did point out to the

Assistant Director-General and, later, the Director of the Human Resources Management Division, inconsistencies in the evidence, its apparent weaknesses and other matters that bore upon its relevance and probative value, before the finding of unsatisfactory conduct was made [...]. In this way, the complainant was able to confront and test the evidence against him, even though he was not present when statements were made and not able to cross-examine the witnesses who made them. Moreover, the complainant had and exercised a right of appeal to the Appeals Committee. There is no suggestion that he was in any way circumscribed in the way his appeal was conducted. Accordingly, the process, viewed in its entirety from the making of the subordinate's harassment complaint until the Committee reported to the Director-General, was one that satisfied the requirements of due process."

16. In the present case, the complainant was similarly informed of the precise allegations against him and was provided with summaries of the witnesses' testimonies relied upon by the investigator. The complainant was given three opportunities to be heard, respond to the allegations against him and provide his version of events before a finding of gross misconduct was reached on 4 October 2012. Thus, the complainant's due process rights were respected even though he was not permitted to attend witness interviews and participate in the examination of the evidence (see, also, Judgment 3083, consideration 3).

17. The complainant also submits the decision to terminate his employment was based on events that by and large took place in a private context and had no link to the performance of official duties. The complainant argues that the decision was taken in violation of well-established international civil service jurisprudence and cites in support Judgment 1312, consideration 14; Judgment 274, consideration 22; and Judgment 203. The complainant also submits that the Global Fund failed to investigate the consensual private context in which the actions took place.

18. It is true, as stated in Judgment 1312, that matters within a staff member's private life are relevant only to the extent that they may affect the staff member's performance of official duties. However, an allegation of harassment is not about the performance of official duties. Instead, it concerns an employee's conduct that has a deleterious impact

on the dignity and wellbeing of another employee. It is for this reason that a determination as to whether any particular act or series of acts amount to harassment can only be made after a careful consideration of the relevant events and an examination of them in the broader context. In the present case, there was a real and substantial nexus between the complainant's conduct and the workplace.

19. It is recalled that the consensual relationship between the complainant and Ms Z. came to an end in July 2011. The first incident reported by Ms Z. occurred shortly after in mid-August 2011. While this incident occurred at her home, it nonetheless provides a backdrop for the numerous instances of inappropriate and unwelcome conduct on the part of the complainant toward Ms Z. that subsequently ensued including: sending unwanted messages and notes, including during working hours; leaving pictures and presents on her desk; telephoning her day and night; and speaking to colleagues at work about their relationship. The complainant also engaged in inappropriate and unwelcome behaviour at a work-related event attended by colleagues at the end of May 2012. Although the event took place off the Global Fund premises, the complainant's characterization of this event as private is completely unfounded.

20. As to the sanction imposed, the complainant submits that the Global Fund failed to take into account the mitigating circumstances and that the sanction of dismissal was disproportionate to the offence. The complainant also notes that Human Resources Regulation Clause 340.8.1 provides alternative sanctions more tailored to the alleged misbehaviour, including a written warning and a final written warning. By disregarding these lesser sanctions, the Global Fund imposed a penalty that was egregiously disproportionate to the behaviour in question.

21. It is observed that the complainant engaged in repeated and serious instances of harassment against another staff member over a long period of time amounting to gross misconduct under the Disciplinary Regulation. Despite the mitigating circumstances including

the complainant's otherwise unblemished disciplinary record, it cannot be said that the sanction imposed was disproportionate.

22. The complainant takes the position that the decision to terminate his employment represented a violation of the Global Fund's obligation to respect his dignity and caused undue harm to his reputation and career. This position is rejected. The investigation and subsequent disciplinary proceeding leading up to the impugned decision were taken in compliance with the relevant regulations and conducted in a manner that respected the complainant's dignity. Any adverse consequences flowing from the decision to terminate his employment arise from the underlying reasons for the termination.

23. The complainant also advances claims of personal prejudice and bias and misuse of authority. These are unsubstantiated claims that do not require any further consideration.

24. Lastly, as the parties' briefs and the evidence they have produced are sufficient to enable the Tribunal to reach an informed decision, the complainant's application for an oral hearing is rejected.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 18 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

ANDREW BUTLER