

B. (No. 2)

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

124th Session

Judgment No. 3865

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms D. A. B. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter “the Global Fund”) on 27 October 2014 and corrected on 14 January 2015, the Global Fund’s reply of 22 April, the complainant’s rejoinder of 24 June and the Global Fund’s surrejoinder of 29 September 2015, corrected on 3 November 2015;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision to terminate her appointment due to the redundancy of her post.

The complainant joined the Global Fund in 2010 under a contract of continuing duration. Due to an accident in late December 2011 she was on sick leave until July 2013.

The complainant was informed by a letter of 19 March 2012 of the abolition of her post in the context of an organization-wide restructuring exercise. She was invited to participate in an internal selection process to fill vacant positions fitting her profile and the letter indicated that,

unless she was appointed or reassigned to another position, there would be several options available to her for separation from the organization.

On 23 July 2013 the complainant returned to work but, as there was no available position, she was placed on special leave with pay for one month, during which time a Human Resources officer was tasked with assisting her in accessing and applying for vacancies.

On 29 July the complainant submitted to the Administration a list of “unresolved grievances”. In particular, she alleged that she had been unfairly and unequally treated and placed at a material disadvantage to other employees during the reorganisation process, because she had been on sick leave at the time. She also complained of “organisational bullying”.

By a letter of 20 August 2013 the complainant was informed of the decision to “confirm” the abolition of her post as of 31 August 2013 and to terminate her employment as of that date. Pursuant to the rules applicable in cases of redundancy she was entitled to receive six months of salary in lieu of the three-month reassignment period and the three months’ notice applicable to long-term employees, a termination indemnity, relocation entitlements for travel, removal and repatriation and a lump sum payment in respect of 30 days of accrued annual leave.

By a letter of 28 August the complainant informed the Administration that, as she had received no response to her list of grievances of 29 July and in light of the decision of 20 August 2013, she was filing a “formal grievance”. She also indicated that she was filing a grievance on a series of matters which supplemented the list of 29 July, such as the abolition of her post, the Global Fund’s failure to take all reasonable steps to find her an alternative position and the incorrect calculation of her accrued annual leave. She asked that the organization remedy the elements of the redundancy package that were underpaid and claimed material and moral damages.

On 12 September 2013 the complainant’s grievances of 29 July were rejected as being time-barred for the most part.

The complainant appealed on 11 November against the decision of 12 September, indicating that she had not received a response to her letter of 28 August 2013. She contested the calculation of her separation

payment and claimed her full salary and benefits until her retirement age, or until such time as she obtained alternative equivalently paid employment or reinstatement to an equivalent position in the organization.

Having organized a hearing, the Appeal Board recommended in its report that the grievances raised in the appeal be dismissed as either irreceivable or unfounded. It identified two unsettled payments, namely the repatriation allowance and the travel costs for returning to her home country, and observed that the complainant had not yet officially claimed them but that the Global Fund had confirmed it would make the payment as soon as she made the request with the appropriate documentary evidence. Regarding the accrued annual leave while on sick leave, it recommended that the Global Fund settle the matter by the most expeditious means, if it was admitted that the complainant was entitled to an additional 30 days.

By a letter of 23 July 2014 the complainant was informed that the Executive Director had decided to endorse the Appeal Board's recommendations. As regards the complainant's annual leave entitlement, the figures previously indicated were considered to be correct, thus no additional amount would be paid to her in this respect. That is the impugned decision.

In her complaint filed on 27 October 2014 the complainant asks the Tribunal to quash the impugned decision and claims damages and costs. She also asks the Tribunal to order the Global Fund to immediately pay the repatriation grant and travel costs which she officially claimed in August 2014, as well as the 30 days in accrued annual leave still owed to her, with interest in view of the considerable delay.

In its reply the Global Fund submits that the complaint is irreceivable in part and unfounded in its entirety. It states that the complainant's repatriation grant and travel costs were paid to her at the end of 2014 and that her claim for payment of an additional 30 days of accrued annual leave is devoid of merit. Considering the complainant's responsibility for the delays in processing her repatriation grant and travel costs, the Global Fund argues that she is not entitled to interest thereon.

In her rejoinder the complainant acknowledges that the payments were made. She submits that according to the methodology used to calculate her accrued annual leave, she is still owed 9.5 days of annual leave. She asks the Tribunal to award her reasonable compensation for the injury.

In its surrejoinder the Global Fund agrees to accept the complainant's revised calculation and to pay her the claimed 9.5 days of accrued annual leave without admission of liability. It provides proof of the payment, which was made in October 2015. As for the remainder of the complaint, the Global Fund maintains that it is partly irreceivable and entirely unfounded.

CONSIDERATIONS

1. The complainant commenced employment with the Global Fund in March 2010 as the Senior Manager, Procurement Relationship Management. On 28 December 2011 she was injured in an accident and commenced on a period of what proved to be lengthy sick leave. She was certified to return to work in July 2013 though she was then placed on special leave. In the meantime, the complainant had been notified in March 2012 that the position she held was being abolished. On 20 August 2013, the complainant was notified she would be made redundant and on 31 August 2013 she separated from the Global Fund. On 11 November 2013 the complainant lodged a request for appeal with the Appeal Board. In a report dated 18 July 2014, the Appeal Board concluded that some of the complainant's grievances were irreceivable as time-barred. As to the remainder, the Appeal Board concluded those grievances were unfounded on the facts, though it recommended that the position in relation to one matter concerning holiday encashment be clarified and, if necessary, acted upon. The Appeal Board's recommendations to this effect were accepted by the Executive Director who informed the complainant of his endorsement of those recommendations in a letter of 23 July 2014 which also clarified the Global Fund's position in relation to the calculation of holiday encashment. This is the decision impugned in these proceedings.

2. The complainant advances three propositions in her brief. The first is that the Global Fund contravened its internal rules and procedures governing redundancy and that her redundancy was unlawful. The second is that the conduct of the Global Fund in relation to the reassignment process involved a breach of its duty to act in good faith and its duty of care towards the complainant. The third was that the Global Fund failed to pay her all monies due on separation and, in particular, failed to pay her a repatriation grant and travel costs, as well as annual leave entitlements referable to her period of sick leave.

3. The Global Fund raises an issue about the receivability of the complaint insofar as the complainant challenges the conduct of the Global Fund by reference to the internal rules and procedures governing redundancy. However the Global Fund's argument proceeds on a false premise. Its argument is that in the letter of 19 March 2012, the complainant was informed that the post she then occupied was to be abolished. This is correct. Thus, the Global Fund argues, a statement that a position is to be abolished is synonymous with a statement that the position was being made redundant. It is unnecessary for the Tribunal to explore whether this is a correct statement either as a general proposition or in the circumstances of this case.

4. That is because in August 2013, when the complainant was expressly told that "[her] position w[ould] be made redundant as of 31 August 2013" and her employment would then terminate, her employment was governed by the provisions of the Global Fund Employee Handbook of August 2012 (the Handbook). Its provisions make clear what redundancy means for present purposes. The Handbook addressed a number of circumstances in which an employee "may separate from the organization" in a section of the Handbook entitled "Separation". Specific circumstances were addressed under particular headings, namely "Contract Expiration", "Retirement", "Voluntary Early Separation", "Mutually Agreed Separation" and the general heading of "Termination". Under this general heading there were several subheadings, namely "Probationary period", "Illness and/or incapacity", "Unsatisfactory performance", "Redundancy", "Discharge" and "Summary dismissal".

5. It is the provisions under the subheading “Redundancy” that the complainant relies on in her pleas. As the provision itself said, it concerns “[e]mployees made redundant”. Thus it concerned the termination of an employee’s employment in circumstances when, again to use the language of the provision, the Executive Director “terminate[s] the appointment of an employee [...] if the job [is] no longer needed by the Organization”. It is then that the employee is made redundant and the focus of the provision is on the employee’s redundancy and not the redundancy of the position per se. The rights and duties of the employee and the organization crystallise not when a decision is taken that the job is no longer needed by the organization but when, as a result, a decision is taken to terminate the employment of the person occupying that position. While the letter of 19 March 2012 alluded to the possibility of the complainant’s separation from the organization, it did not speak in terms that indicated a decision had been made to terminate the complainant’s employment. The letter simply advised of the abolition of the complainant’s position. Indeed it can be inferred from its terms that no decision to terminate had then been made. The complainant was not informed of that decision (to terminate her employment) until the letter of 20 August 2013. Accordingly the Global Fund’s premise founding its argument on receivability that informing the complainant of the abolition of her position involved telling her that she was being made redundant for the purposes of the provisions of the Handbook on which the complainant relies, is a false premise. Accordingly the Tribunal rejects the Global Fund’s argument that the complaint is irreceivable in part.

6. The complainant’s first proposition concerns the provisions of the Handbook under the subheading “Redundancy” referred to above. Those provisions contained, relevantly for present purposes, two elements. The first element was that when a decision was made to terminate the appointment, the Executive Director had to “giv[e] written notice thereof [...] at least six months ahead of the effective date of termination for Long-Term Employees”. The second element was that employees in the position of the complainant (being a long-term employee) “may be offered a reassignment period of three months if suitable job

opportunities within the Global Fund are likely to be available during that period”. In fact, the complainant was not given six months’ notice but was paid six months’ salary in lieu of notice and was not offered a three-month reassignment period. The Tribunal notes that immediately following the heading “Termination” referred to in consideration 4 above, there was a provision enabling termination by giving notice (three months for Long-Term Employees and one month for all other employees). The provision reads as follows:

“The Global Fund may terminate the employment contract of an employee under the circumstances listed below. In each case, and unless otherwise indicated in the employment contract or as expressly stated below, the notice period for termination is three months for Long-Term Employees and one month for all other employees. The Global Fund may waive the notice period either upon request of the employee or in the interest of the Global Fund. In the latter case, the employee is entitled to payment in lieu of notice.”

7. The Tribunal notes that the Global Fund may waive the notice period either on request of the employee or in the interests of the Global Fund and, in the latter case, the employee is entitled to payment in lieu of notice. While it is not free from doubt, the better view is that the right to make payment in lieu of giving notice is intended to apply to any notice authorised under this general heading of “Termination”, including under the subheading “Redundancy”, though the amount of the payment (referable to the period of notice) will vary depending on the period specified under any of the subheadings. This conclusion is based in substantial part on the reference to “under the circumstances listed below. In each case, and unless otherwise indicated [...] or as expressly stated below”. These words are clearly intended to link the obligation to give notice and the right to make payment in lieu to any notice capable of being given under any of the subheadings including “Redundancy”.

8. The gist of the complainant’s first proposition is that she should have been given six months’ notice of termination as provided for under the Handbook. As just discussed, it was open to the Global Fund to pay her six month’s salary in lieu of notice. Accordingly this first proposition should be rejected.

9. However the right to make payment in lieu of notice conferred by the Handbook, does not absolve the Global Fund of its more general obligation to do all it can to reassign an official whose position has been abolished (see, for example, Judgments 3754, consideration 16, and 3755, consideration 6). This underpins the substance of the complainant's second proposition, namely that there had been a violation of her right to a reassignment process by the Global Fund not offering her a reassignment period of three months. Implicit in her submissions is that, at the time she was paid in lieu of notice, suitable job opportunities were likely to be available in that period. The relevant provision in the Handbook reads as follows:

“Long-Term Employees may be offered a reassignment period of three months if suitable job opportunities within the Global Fund are likely to be available during that period. During such period, the employees may be offered appropriate retraining.”

10. It is convenient, at this point, to refer to relevant facts in a little more detail. In January 2013, the complainant commenced discussions with the newly appointed Chief Procurement Officer about the complainant's future employment. In earlier proceedings before the Tribunal the complainant failed to establish that these discussions crystallised into a job offer which was withdrawn as an act of retaliation towards the complainant (see Judgment 3748). However, the Tribunal did note in that judgment that the Chief Procurement Officer was interested in the complainant securing further employment in the Procurement Department and was both supportive and positive in his tone. The particular position discussed between the Chief Procurement Officer and the complainant was that of Supply Chain Manager. Nonetheless, probably in February 2013, the position was offered to another staff member, Mr N. who took up the position. However, on the complainant's account in her brief, by August 2013 Mr N. had resigned. The complainant was told of this by a work colleague and she relayed this to the Head, Human Resources Department (HR), at a meeting on 20 August 2013. In her brief the complainant says that she then requested that she be allowed to serve her three-month reassignment period to enable her to be considered for this position of Supply Chain

Manager. A similar submission is repeated by the complainant in her rejoinder.

11. The Global Fund contests this version of events. In its reply, the Global Fund says that at the time of the separation letter (20 August 2013) and the time of separation (31 August 2013), Mr N. was still employed and his employment did not come to an end until 15 October 2013. It goes into a little more detail in its surrejoinder. It says that “[Mr N.’s] decision to separate was only confirmed to the administration on 13 September 2013”. The Global Fund goes on to say that it is “unable to provide further particulars or evidence regarding [Mr N.’s] separation without breaching its duties of care and confidentiality towards him. However, such particulars or evidence can be provided upon request for the Tribunal’s eyes only, to the extent deemed relevant by the Tribunal”. Quite what is meant by saying a decision to separate was confirmed, as opposed to communicated, is unclear. In any event, ordinarily it is a matter for the parties to decide what evidence they provide to the Tribunal and it is not for the Tribunal to say what evidence it requires. There is nothing about this case that would warrant a departure from that essential feature of the adversarial process. The Tribunal notes that the Global Fund goes on to say in its surrejoinder that “when it confirmed the [c]omplainant’s separation, and when she actually did separate, [it] had no knowledge that the incumbent Supply Chain Manager would leave its employment and that his position would soon become available”.

12. However, what is of some importance is that there is no denial by the Global Fund in either the reply or the surrejoinder that the complainant’s belief, clearly mistaken, that Mr N. had resigned was discussed at the meeting on 20 August 2013 between the complainant and the Head, HR. It may well be correct to say that at that time the Global Fund, and the Head, HR in particular, did not know that Mr N. was going to resign as he did a little over three weeks later. Nonetheless it is clear that the complainant was acting on information she had been provided by someone within the organization. The information was wrong in the sense that Mr N. had not by then resigned. However, the

informant must have had some information that provided a foundation for this erroneous belief. It is probable that some event had occurred which led the informant to believe that Mr N. had resigned. It may have been something that either Mr N. or someone else associated with him said or did. The fact that Mr N. did resign a little over three weeks after the meeting on 20 August 2013, supports an inference that such an event did occur and prompted the informant to tell the complainant of her or his belief about the status of Mr N. as an employee of the Global Fund.

13. Ordinarily it could not be expected that the Head, HR, would act on rumour, particularly if it was known to be wrong. But this was a situation where a staff member was about to be separated from the organization because her position had been abolished and where, as discussed earlier, the Global Fund was under an obligation to do all it could to reassign an official whose position had been abolished. At the very least, what the complainant said about Mr N. should have resulted in the Head, HR, making some enquiries particularly and importantly, in view of the discussions the complainant had had with the newly arrived Chief Procurement Officer in January 2013. Indeed, by the time of this discussion on 20 August 2013, the complainant had lodged a grievance with HR about the withdrawal of the alleged offer that she could take up this position of Supply Chain Manager. It could not have been the case that the Head, HR, was not aware of the complainant's interest in this position.

14. The Tribunal is satisfied that the Global Fund did not, as required by the Tribunal's jurisprudence referred to at the commencement of consideration 9, above, do all it could to find another suitable position for the complainant. It should have taken steps, even if discreetly, to ascertain whether anything was known within the organization about Mr N.'s intentions and whether the position of Supply Chain Manager was "likely to be available" to paraphrase the language in the Handbook referred to in consideration 9. The Global Fund was not then required to adhere to the position it had adopted in its letter of 20 August 2013. It could have withdrawn the letter and taken some other position including retaining the complainant for a further, possibly short, period while those

enquiries took place. For this failure, the complainant is entitled to moral damages which the Tribunal assesses in the sum of 40,000 euros. No question of material damages arises because of the combination of the payment of the six months' salary in lieu of notice and the fact that the complainant apparently took up other employment shortly after leaving the Global Fund. In any event, no evidence was led by the complainant about economic loss which might sound in an award of material damages, and she explicitly eschewed any claim for damages for loss of income in her rejoinder.

15. The complainant's third proposition concerns the amount she was actually paid upon separation. However, on the pleas, the Global Fund has agreed to pay a further amount without admission of liability. As the Tribunal apprehends it, this resolves the complainant's claim in this respect insofar as she pursued her original claims in her rejoinder.

16. In the result, the complainant is entitled to 40,000 euros by way of moral damages, as well as costs which the Tribunal assesses in the sum 5,000 euros. All other claims should be dismissed.

DECISION

For the above reasons,

1. The Global Fund shall pay the complainant 40,000 euros in moral damages.
2. The Global Fund shall pay the complainant 5,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 11 May 2017, 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 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ