

H.

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

125th Session

Judgment No. 3923

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. I. H. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter “the Global Fund”) on 10 June 2016 and corrected on 22 July, the Global Fund’s reply of 31 October 2016, the complainant’s rejoinder of 6 February 2017 and the Global Fund’s surrejoinder of 10 May 2017;

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

Having examined the written submissions;

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

The complainant challenges the decision of the Chair of the Appeal Board to dismiss as time-barred his internal appeal against the non-confirmation of his appointment and his separation while on sick leave.

The complainant joined the Global Fund on 9 March 2015 under an indefinite term contract. His appointment was subject to a probationary period of six months.

At a meeting held on 30 July 2015 the complainant and his line manager discussed the outcome of his probation. During that meeting, he was informed of the decision not to confirm his appointment on the ground that his performance had not been satisfactory. He received formal notification by a letter dated 31 July 2015 which indicated that his last day of employment would be 8 September 2015.

On 20 August 2015 the complainant filed a first request for resolution challenging the decision not to confirm his appointment and asking the Global Fund for a 6-month extension of his probationary period from 9 September 2015.

At the request of the complainant, who claimed in late August that he was on sick leave due to a service-incurred illness, the Global Fund exceptionally extended his notice until 2 October to cover the period of his sick leave. He was examined by a medical expert to determine whether his illness was service-incurred and was informed, by a letter of 2 October, that the medical expert had concluded that his medical condition was not service-incurred.

On 14 October the complainant submitted a second request for resolution challenging the decision to separate him while on sick leave and asking for the decision to be withdrawn.

By a letter dated 20 October, which was sent electronically as an attachment to an email of the same date, the Head of the Human Resources Department dismissed the complainant's two requests for resolution as unfounded.

On 21 October the complainant acknowledged receipt of the letter and announced his intention to appeal it.

On 27 December 2015 the complainant submitted his appeal to the Global Fund Appeal Board against the decision of 20 October, alleging that he had not been able to read it until 27 October 2015 due to a lack of access to the Internet while travelling in Africa.

By a decision of 14 March 2016, which according to Section 2.2 of the Appeal Board Operating Procedures for Appeal amounts to a final decision, the Chair of the Appeal Board dismissed the complainant's appeal as irreceivable on the grounds that it had not been submitted within the 60-day time limit and that no waiver or extension of the time limit had been requested, nor was there any evidence of extraordinary circumstances. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order his reinstatement in his former position with full retroactive effect or, in the alternative, to award him one year of gross

salary, with all benefits and entitlements. He claims moral and exemplary damages, as well as costs, with interest on all sums awarded.

The Global Fund asks the Tribunal to reject the complaint as manifestly irreceivable and devoid of merit.

CONSIDERATIONS

1. The complainant seeks to set aside the impugned decision of 14 March 2016, which dismissed his internal appeal as being out of time and therefore irreceivable. He had thereby appealed against the decision not to confirm his appointment on the ground of unsatisfactory performance at the end of his probationary period. The complainant had also appealed against the decision to finally terminate his appointment on 2 October 2015 on the ground that this decision was unlawfully taken when he was on sick leave. He contends, in the present complaint, that the Global Fund took those decisions in violation of its own internal rules, as well as in violation of its duty of care and of good faith owed to him as a staff member.

2. The Global Fund raises receivability as a threshold issue contending that the Appeal Board correctly found that the complainant had lodged his internal appeal outside of the 60-day time limit.

3. The Global Fund's internal rules required the complainant to lodge his appeal within 60 days of receipt of the response to his requests for resolution. Section 4 of Annex X to the Employee Handbook relevantly states:

“4. Appeals

If the employee deems that the Response does not satisfactorily address the concerns raised in the Request for Resolution or if no Response is received within the applicable deadline, he/she may submit an Appeal to the Global Fund Appeal Board in accordance with its Operating Procedures for Appeal. Such Appeal shall be submitted no later than 60 days after receipt of the Response or, where no Response is received, sixty days after the date on which it should have been received. [...]"

Section 2.1.a of the Operating Procedures for Appeal relevantly states as follows:

“2. Initial Proceedings

2.1. Submission of an Appeal

2.1.a. An Appellant may submit an appeal by completing, dating and signing a Request for Appeal Form (see Attachment 1), and submitting it, along with supporting documents, to the [Office of the Appeal Board] no later than 60 days after receipt of the Administration’s Response [...].”

4. In his decision, the Chair of the Appeal Board referred to the Tribunal’s consistent case law that time limits are an objective matter of fact, which guarantee legal certainty for the parties and the Tribunal. The Chair of the Appeal Board referred to Judgment 2266, considerations 2 and 3, and Judgment 2901, consideration 11. This case law is fully reproduced in a recent restatement made in Judgment 3651, considerations 5 and 6:

“5. In Judgment 3311, considerations 5 and 6, the Tribunal reiterated that the time limits for internal appeal procedures serve the important purposes of ensuring that disputes are dealt with in a timely way and the rights of parties are known to be settled at a particular point of time. The Tribunal relevantly rationalized this approach in the following terms: time limits are an objective matter of fact and strict adherence to them is necessary, otherwise the efficacy of the whole system of administrative and judicial review of decisions potentially adversely affecting the staff of international organisations would be put at risk. Flexibility about time limits should not intrude into the Tribunal’s decision-making even if it might be thought to be equitable or fair in a particular case to allow some flexibility. To do otherwise would ‘impair the necessary stability of the parties’ legal relations’ (see Judgment 2722, consideration 3). However, there are some exceptions to this general approach, which have been expressed in the Tribunal’s case law.

Additionally, however, [the relevant provision] provides that the Appeals Committee may consider an appeal that has been filed out of time to be receivable if it finds that the failure to abide by the time-limit was for a reason that was outside of the complainant’s control and the length of the delay in filing was reasonable in the circumstances of the case.

6. The complainant only states that his appeal was hampered because upon being separated from service, [the international organization] discontinued his email account and that this action delayed his preparation of the appeal. It is however noted that the [international organization] re-activated

the complainant's account a week later for thirty days. As the Appeals Committee found, this circumstance did not justify the late filing of the complainant's appeal some two and a half months after his account was restored. Accordingly, the complaint is irreceivable, under Article VII, paragraph 1, of the Statute of the Tribunal, as the complainant has not exhausted the internal means of appeal and has failed to submit his appeal to the Director-General within the prescribed time limit required by [the relevant provision]."

5. The Chair of the Appeal Board noted the complainant's statement that "due to travel and other complications (lack of access to the Internet where [he] was in Africa)" it was not until 27 October 2015 that he had accessed the email dated 20 October 2015 informing him that his requests for resolution were dismissed. The Chair of the Appeal Board held that "[t]his submission without any substantiation or corroboration cannot be accepted as such [as it is consistent principle] that, when submissions are made, it is for the party that makes [them] to provide convincing [...] evidence", which the complainant had failed to do. The Chair found that, even if the complainant had opened the email on 27 October, he had not provided any good reason to explain why he was unable to lodge the appeal "within the time limits and why he waited until 27 December 2015 to submit his appeal". Additionally, the Chair stated that the complainant did not request a waiver under Section 1.3 of the Operating Procedures to extend the time limit, neither did he provide any evidence of extraordinary circumstances that fitted into one of the exceptions to the general rule for strict adherence to specified time limits. Essentially, the Chair of the Appeal Board dismissed the complainant's internal appeal because he found that it was lodged one day out of time; he had not applied for a waiver of the time limit and he provided no evidence that the appeal fell within any of the exceptions to the general rule regarding irreceivability.

6. The Global Fund however provides evidence to the Tribunal which shows that the complainant had on 21 October 2015 acknowledged receipt of the Global Fund's email of 20 October 2015 containing its response to his requests for resolution. In that acknowledgement, he objected "strongly to the decision [...] not to confirm [his] appointment

as a Senior Program Officer in [the] Grant Management Division following [his] probation”. He stated that he intended to file a formal appeal with the Appeal Board in accordance with the Global Fund’s Grievance and Dispute Resolution provisions. The Global Fund also provides a Separation Entitlement Form which the complainant completed. In it, he entered the start date for his service as 9 March 2015 and separation date as 2 October 2015. He dated the Form 23 October 2015. The Tribunal infers from the above that the complainant knew from the letter of 20 October that the date of his separation was confirmed and that he received the response to his requests for resolution on 21 October 2015. He was therefore notified of the decision on that date.

7. Consequently, when the complainant lodged his internal appeal on 27 December 2015 it was 67 days after he was notified of the decision to dismiss his requests for resolution and six days outside the time limit for lodging the appeal, the 20th December being a Sunday. His appeal would still have been one day outside of the time limit if, as he asserts, he only read it on 27 October 2015. He has provided no evidence of circumstances which would bring his appeal into any of the exceptions to the general rule for strict adherence to specified time limits. His complaint is therefore irreceivable as he did not exhaust the internal means of redress which were open to him under the Global Fund’s internal regulations as Article VII, paragraph 1, of the Tribunal’s Statute requires. His complaint will therefore be dismissed in its entirety.

8. In these circumstances, an oral hearing would serve no useful purpose and the complainant’s application to that effect is rejected.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 25 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ