

C.

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

126th Session

Judgment No. 3997

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. C. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter “the Global Fund”) on 21 October 2014 and corrected on 17 December 2014, the Global Fund’s reply of 19 March 2015, the complainant’s rejoinder of 29 May and the Global Fund’s surrejoinder of 2 September 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 his 2012 performance evaluation.

The complainant joined the Global Fund in 2006. In April 2012 he began working as an Administrative Assistant in the Grant Management Directorate under the supervision of Ms D.-C. In November 2012 he was transferred to the Central Africa Regional Team, under the supervision of Mr T.B.H.

On 16 January 2013 Ms D.-C. completed the complainant’s performance evaluation for the period from 1 July to 7 November 2012 (hereinafter the “2012 performance evaluation”) and gave him an overall rating of “Serious concerns”.

At the material time the Global Fund Employee Handbook did not contain rules governing the review of a performance evaluation in the event that a staff member disagreed with her or his evaluation. In an email to all staff of 14 May 2013 the Head of the Human Resources Department (HRD) provided information about the process for reviewing performance evaluation ratings, amongst other things. By an email of 29 May to the Head of HRD, the complainant challenged the 2012 performance evaluation on several bases, asked that it be declared void, and sought its removal from his personnel file. He attached several documents to his email, including a summary of events which had occurred prior to the issuance of the 2012 performance evaluation in which he alleged that he had been harassed and bullied by Ms D.-C.

A series of exchanges and meetings ensued between the complainant and members of the Administration in an attempt to resolve the issue. On 26 November 2013 the Head of HRD offered the complainant two options. Either his new manager, Mr T.B.H., could rewrite the 2012 performance evaluation including, as he saw fit, the views of Ms D.-C., or the complainant's letter of 29 May 2013 outlining the issues with the 2012 performance evaluation could be added to his personnel file. In addition, the Head of HRD stated that she took his allegations of bullying and harassment seriously and she explained that in order to immediately pursue further investigation she needed a detailed list of events and allegations which should accompany his related grievance in the event he wished to pursue such a grievance.

On 23 January 2014 the complainant filed an appeal before the Appeal Board against the decision of 26 November 2013 rejecting his request to have the 2012 performance evaluation declared null and void and removed from his personnel file. In its report of 14 July 2014 the Appeal Board concluded that there had been procedural flaws in the performance evaluation, that there was no correlation between the contested performance evaluation and the allegations of bullying and harassment, that it did not have any basis to pursue the accusations of bullying and harassment (this was not the matter contended in the appeal) and that there was no supporting evidence that the complainant had suffered personal prejudice. A majority of the Appeal Board members

recommended that the 2012 performance evaluation be set aside and redone in accordance with the applicable rules. The Appeal Board further recommended that the remainder of the appeal be dismissed on the merits.

By a letter of 23 July 2014 the Executive Director endorsed the Appeal Board's recommendations. That is the impugned decision.

Following the decision of the Executive Director, the complainant's supervisor, Mr T.B.H., completed a second 2012 performance evaluation for the complainant and recorded it in the performance management online system.

The complainant asks the Tribunal to quash the impugned decision, to declare the 2012 performance evaluation null and void and to order its removal from his personnel file. He seeks 65,000 Swiss francs in compensation under various heads and the reimbursement of his legal costs.

The Global Fund submits that the complainant's claim regarding the 2012 performance evaluation is moot as the evaluation in its initial form has been replaced. It contends that his claims for compensation in the amount of 65,000 Swiss francs are irreceivable as he did not raise these claims during the internal appeal process. It asks the Tribunal to dismiss the complaint in its entirety and not to award costs.

CONSIDERATIONS

1. In January 2013 an evaluation was undertaken of the complainant's performance for the period from July to November 2012. For several reasons, the complainant was dissatisfied with that evaluation including the manner in which it had been created and what he believed was attendant bias and prejudice.

2. In due course and after an internal appeal, the Appeal Board, by a majority, recommended that the 2012 performance evaluation be set aside and that the evaluation process be redone in accordance with the applicable rules. Its second recommendation was to "dismiss the case on all other merits". By a letter dated 23 July 2014, the Executive Director of the Global Fund informed the complainant that he had

endorsed the recommendations of the Appeal Board. That necessarily involved acceptance that the 2012 performance evaluation be set aside. Indeed the Executive Director went on to say: “Consequently, I have requested your line manager to conduct [...] a fresh, integrated evaluation of your performance in 2012 with all deliberate speed [...]”. This is the decision impugned in these proceedings.

3. It is convenient to consider, at the outset, the relief sought by the complainant in his complaint before the Tribunal. It is:

“[...] that the decision of the Executive Director in his letter of 23 July 2014 should be quashed and that the Tribunal should declare the disputed performance evaluation null and void and removed from his records.

As a compensation for the personal prejudice and damage to the [c]omplainant’s professional and personal life caused by the defamatory evaluation report and the lack of any satisfaction given by the Global Fund to his fair request, the [c]omplainant respectfully requests the following payments:

- (1) CHF 20,000 – in damages for the [Global Fund]’s lack of due process for not addressing the substance of the [c]omplainant’s grievance, for not investigating openly and for the Human Resources Department’s lack of adherence to the Global Fund’s Rules and procedures;
- (2) CHF 20,000 – in damages for flouting the [Global Fund]’s published values to the [c]omplainant’s detriment;
- (3) CHF 20,000 – in compensation for the consequences of the lengthy process and the lack of support and care for the [c]omplainant’s well-being;
- (4) CHF 5,000 – compensation for the denial of a salary increase;
- (5) Reimbursement of legal costs.”

4. It is also convenient to set out what the complainant claimed in his internal appeal. In his Request for Appeal dated 23 January 2014 initiating the internal appeal, the complainant identified the relief he was seeking as: “Primarily, that the [2012] performance evaluation be declared null and void and removed from [his] records.” He also sought, as the second and third elements of the relief, what he described as “symbolic compensation of CHF 1.00 (one Swiss Franc)” for both a “lack of adherence by [Human Resources] to [...] rules and procedures”, and “the consequences of this lengthy process [including] prolonged mental and physical suffering caused to [him] and [his] family [...] and

the lack of any support”. He also sought, as the fourth element of the relief, recognition that the performance evaluation had to be withdrawn because it was not based on evidence and was defamatory and, lastly, as the fifth and final element of the relief, a letter from the Executive Director effectively guaranteeing protection from retaliation.

5. The complainant succeeded in obtaining his primary relief with the qualification that no recommendation was made by the Appeal Board nor adopted by the Executive Director that the 2012 performance evaluation be removed from his personnel file.

6. The Global Fund argues that the complaint is irreceivable insofar as damages are sought in the way specified in subparagraphs (1) to (4) set out in consideration 3 above. It refers to Judgment 3069, consideration 5. In that matter the complainant had, before the internal appeal body, sought symbolic damages in the amount of one Swiss franc but in the proceedings before the Tribunal had sought to convert that claim into a claim for actual and moral damages. The Tribunal found that claim was irreceivable and cited Judgment 2837, consideration 3. The present case is indistinguishable in this respect and the complainant cites no authority to resist the conclusion that the claims for damages are irreceivable. They are not receivable and will be dismissed.

7. The remainder of the complainant’s claims are that the impugned decision be quashed, that the Tribunal declare the contentious performance evaluation null and void and that he be awarded costs. However there is no basis for granting this relief (putting aside the question of costs) as the performance evaluation was set aside in the impugned decision. At law, it no longer exists so there is nothing on which the order as sought in the Tribunal could operate. The fact that the reasoning of the Appeal Board and the decision of the Executive Director did not embrace all the reasons advanced by the complainant for setting aside the 2012 performance evaluation does not alter the legal effect of what in fact was done. More generally, what ordinarily engages the Tribunal’s jurisdiction is a challenge to a final decision with operative legal effect and not a challenge to the reasons underpinning that decision. Obviously if there is a final decision with an operative

legal effect then a challenge to that decision can also impugn the reasoning leading to it. But that is not the present case.

8. Potentially the only residual issue is whether there is a basis for, additionally, ordering the removal of the original contentious 2012 performance evaluation from the complainant's personnel file which the Global Fund has not contended, with any clarity, has already occurred. Such an order is routinely made by the Tribunal in circumstances where the production of an evaluation report or an analogous document is found to have been legally flawed. Indeed it has been put as highly as an entitlement to have it removed. That is to say, a complainant is entitled to an order that the report be removed from the personnel file (see, for example, Judgment 3378, consideration 12). The Tribunal will make such an order. As the complainant has had some limited success, he is entitled to an order for some of his costs. The Tribunal assesses the appropriate sum as 2,000 Swiss francs.

9. The complainant sought the disclosure of documents. The Global Fund has, in its reply, disclosed a document which may have, either partially or completely, satisfied this request. Nonetheless, given the above findings, there is no need to order the disclosure of additional documents.

DECISION

For the above reasons,

1. The 2012 performance evaluation of 16 January 2013 shall be removed from the complainant's personnel file and from any other repository of the complainant's employment history with the Global Fund.
2. The Global Fund shall pay the complainant 2,000 Swiss francs in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2018, Mr Giuseppe Barbagallo, 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 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ