

A.

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

121st Session

Judgment No. 3610

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Z. A. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter “the Global Fund”) on 27 February 2013 and corrected on 5 May, the Global Fund’s reply of 28 August, the complainant’s rejoinder of 12 December 2013, the Global Fund’s surrejoinder of 8 April 2014, the complainant’s additional comments of 18 October 2014 and the Global Fund’s final submissions of 24 February 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:

In 2012 the Global Fund underwent a significant restructuring and the complainant signed a separation agreement which she contests before the Tribunal.

On 29 March 2012 the complainant signed the separation agreement that was given to her during a meeting eight days earlier. She added seven conditions to the standard separation agreement, which the Global Fund accepted. She separated from service on 30 April 2012.

In May 2012 she started raising concerns with the Administration at the lawfulness of the separation agreement and at the end of the month she filed an appeal with the Appeal Board challenging it. She asked that the separation agreement be annulled alleging that it was signed under duress. She also requested the following: implementation of strict measures to evaluate, protect and guarantee any payments due to her, transfer or secondment to another organisation on a similar post and with a similar contract, compensation for “physical, mental, moral and professional” prejudice, and financial compensation in relation to the non-reimbursable medical expenses she incurred. She further asked that the Global Fund initiate the procedure to have her illness – which deteriorated pursuant to the restructuring – recognised as work related, and to reimburse her legal fees.

On 7 December the Appeal Board issued its report indicating that it had decided to accept the appeal. It felt that no decision could have been made on the complainant’s allegation of duress without a review of the documents submitted. It noted that she was offered two options: signing the separation agreement or going through the Performance Improvement Plan (PIP). That latter option was inappropriate as the improvement plan was clearly designed for those who underperformed, which was not her case. It considered that her claim that she was told that she would fail her PIP if she decided to opt for that possibility was “credible” but found no written evidence of it. It therefore concluded that she was actually left with only one possibility, i.e. signing the separation agreement, which amounted to duress. The separation agreement should therefore be declared null and be replaced with an alternative separation agreement. The complainant should also be awarded six months’ salary, in addition to the financial compensation due under the separation agreement, as a final and binding lump sum compensation for any adverse impacts she may have suffered. It also recommended that the medical expert of the Global Fund’s health insurer should determine the cause of her illness. Lastly, it recommended dismissing the claim for reimbursement of legal fees, stressing that the internal appeal proceedings did not allow for the involvement of any lawyer.

By memorandum of 13 December 2012 the General Manager informed the complainant that he found no evidence of duress, which entailed unlawful threats to compel a person to sign an agreement that, absent that unlawful pressure, they would not have signed. None of the actions considered by the Appeal Board were relevant to that end, except for the fact that the complainant might have been told that she would fail the performance improvement plan if she decided to opt for that possibility instead of signing the separation agreement. However, given that the Appeal Board merely found that her claim in that respect was “credible” and did not find any tangible evidence, the General Manager could not endorse its conclusions. He recalled that the complainant had waived her right to contest any matters related to her separation and therefore concluded that the appeal was irreceivable. That is the impugned decision.

The complainant asks the Tribunal to cancel the separation agreement and to order that it be replaced by another one with appropriate compensation being provided. She also claims compensation for loss of career opportunities, stressing that she does not request to be reinstated due to dreadful treatment she suffered and potential reprisals. She asks the Tribunal to order the Global Fund to publicly acknowledge its wrongdoings in order to mitigate the impact of her sudden departure on her work reputation, and to recommend that the Global Fund’s behaviour be independently investigated for abuse of authority (in particular on the part of the Head of the Grant Management Division during 2011-2012). She further claims compensation for moral and professional prejudice, as well as costs.

In her rejoinder she specifies that she seeks the quashing of the impugned decision, the condemnation of the General Manager’s behaviour, together with compensation for the irregular 2011 performance management process, and for undue delay in providing the evaluation report. She further claims compensation for discrimination on the basis of her health and with respect to the false statements made by the Global Fund.

The Global Fund asks the Tribunal to dismiss the complaint as irreceivable and unfounded and not to award costs to the complainant.

It submits that the claims added at the rejoinder stage are inadmissible. It also seeks an award of costs against the complainant, on the grounds that the complaint is vexatious. It stresses that the complainant has been generously compensated under the separation agreement and that she found a job soon after separating from service.

CONSIDERATIONS

1. The complainant is a former employee of the Global Fund. She joined the Global Fund in December 2007 and worked until her separation, effective 30 April 2012, under the terms of a mutually agreed separation agreement signed on 29 March 2012. Prior to her separation, the Global Fund underwent a significant restructuring in which several employees (including the complainant) were allegedly identified as requiring support with regard to their abilities to meet the requirements expected pursuant to the Global Fund's new objectives. These employees were offered two options: continue working in the same role while agreeing to participate in a work program aimed at ensuring success in their new position (a Performance Improvement Plan or PIP); or accept a separation agreement. The complainant decided against undergoing the proposed PIP and after eight days of consideration and negotiations, she signed the separation agreement and was put on special leave with pay until the end of April 2012 when her separation came into effect.

2. The complainant filed an internal appeal on 22 May 2012 stating that she had signed the separation agreement under duress. She requested that the separation agreement be cancelled and replaced by another agreement; recognition of her illness as work-related due to the pressure and threat suffered as a result of being forced to choose between signing the separation agreement or accepting a PIP that she allegedly was informed she would fail; material damages as compensation for loss of career opportunity; moral damages; and costs. The Global Fund contested the receivability of the appeal as paragraphs 6(ii), 7, and 10 of the separation agreement expressly precluded appeals or other legal action against the Global Fund. In its report dated 7 December 2012,

the Appeal Board accepted the appeal and in its proceedings the Appeal Board considered the following issues: the basis of the separation agreement; whether the complainant's position of Senior Program Officer changed significantly from the old to the new structure; whether it was appropriate to offer the complainant a PIP as the only way to remain in the Global Fund; the complainant's reaction to the choice of signing a separation agreement or going through the PIP; and the climate at the Global Fund at the time. It concluded that "not only was the [separation agreement] inappropriately handled, there was clear undue pressure on the [complainant] to sign [it]". It based its conclusion on four main elements. The first was that the complainant had a reasonable expectation that her employment would continue if her post was mapped into the new structure; there was a lack of evidence to support the Global Fund's assertion that her post in the new structure differed significantly from her post under the old structure. The second was that she lacked the requisite skill/competencies to perform in the "new" role, therefore it was inappropriate to offer a PIP and the regulations and procedures applicable to the PIP were breached as there was no evidence of underperformance. The third was that the complainant's claim that she was told she would fail the PIP was "credible" although no written evidence was found. The fourth was that the complainant was not informed of the option of applying for any of the vacancies generated from the restructuring. Accordingly, the Appeal Board recommended that the separation agreement be nullified and replaced with an alternate agreement, that the Global Fund's health insurance medical expert should diagnose the cause of the complainant's illness during the restructuring, that the complainant be awarded six month's salary "as a final and binding lump sum compensation for any adverse impacts she may have suffered" over and above any financial compensation that may have been made as part of the contested separation agreement, and that in keeping with usual practice, no costs be awarded for the internal appeal.

3. In his decision dated 13 December 2012, the General Manager decided that:

“(1) The [complainant’s] appeal was irreceivable when it was filed, because it was inconsistent with her undertakings, contained in her [separation agreement], not to file an appeal and not to avail herself of the Grievance and Dispute Resolution Procedure.

(2) The finding that the [complainant] was under a state of duress when she signed the [separation agreement] cannot be upheld because the evidence I have reviewed does not suggest such a conclusion on the balance of probabilities. In fact such documentary evidence as I have reviewed suggests the opposite.

(3) Accordingly the [separation agreement] must be considered final and binding upon the [complainant] and indeed upon the Global Fund itself.

(4) Therefore the [complainant] cannot be granted any relief, either that sought by the [complainant] or that recommended by the Appeal Board.

(5) In bringing this appeal, the [complainant] stands in breach of her own [separation agreement] and that breach has caused the [complainant] loss. However the legal consequences of that shall be held over until another day.”

4. In the present complaint the complainant contests her separation from the Global Fund and the General Manager’s decision of 13 December 2012 to reject the recommendations of the Appeal Board. She bases her complaint on the grounds that: the procedure leading to the termination of her continuing duration contract and signature of the separation agreement was done under duress; the termination of her contract was irregular – based on an invalid performance evaluation process; and there was blatant abuse of authority and bias against her by the Head of the Grant Management Division (her fourth-line supervisor) due to her speaking at a Town Hall meeting in November 2011 with the Chair of the Global Fund Board.

5. The Global Fund challenges the receivability of the complaint and makes a counterclaim for costs as it considers that the complaint is “frivolous and vexatious”, breaches the agreement reached in the separation agreement, and constitutes an abuse of process.

6. The Global Fund’s objection to receivability, based on the argument that the complainant, by signing the separation agreement, waived her right to challenge either the validity or the content thereof,

does not stop the Tribunal from examining the validity of that agreement as if it is not valid, none of the clauses can be upheld.

7. The complainant was offered two options. The first was to continue in her position as Senior Program Officer while agreeing to participate in a PIP designed to ensure her success in accordance with increased expectations following the restructuring. The second was to choose to leave the organization under an enhanced separation agreement. As noted in the Appeal Board's report in relevant part:

“[a]ccording to HR Regulation [11 on] Performance Management [paragraph] 3.1.8, a PIP is ‘a structured plan developed by the line manager and the employee with support from HR when performance which does not meet expectations is identified’. Further from the Managing Underperformance Procedure [in the HR Procedures] it states the following: [paragraph] 2.1.4 A Performance Improvement Plan (PIP) is used to structure the discussion and identify follow-up actions to outline in detail what is expected of employees in order to meet performance expectations. It is put in place related to the following situations: 2.1.4.1 year-end overall performance evaluation concludes that the performance of an employee does not meet the expectations or 2.1.4.2 performance improvement discussions, which can be initiated any time throughout the year, do not lead to consistent performance improvements.

From a review of the [complainant's] performance appraisals for the years 2008, 2009, 2010 and 2011 (the latter two years as Senior Program Officer), the Appeal Panel found no issues with performance. All performance objectives were either met with ratings of ‘achieves expectations’ or ‘exceeds expectations’. Comments from the [complainant's] supervisors in the Performance Evaluation documents of 2010 and 2011 do not indicate any issues or potential issues with the [complainant's] ability to perform as Senior Program Officer. The Appeal Panel also did not find any credible evidence in the [organization's] submissions that the [complainant] would need to be placed on a PIP or undergo any form of training to perform well in the new position.”

The complainant was not eligible to be put on a PIP as she had consistently met the expected levels of performance. As participation in a PIP was not an available option for the complainant under the regulations, it should not have been offered as an alternative to signing a separation agreement. In doing this, the Global Fund created undue pressure on the complainant. Consequently, the separation agreement

signed by the complainant on 29 March 2012 is not valid and must be set aside on the grounds that the complainant signed it under duress.

8. This is particularly so as the PIP could result in the complainant's separation from service (paragraph 3.4.4 of HR Regulation 11 provides: "The Global Fund may terminate an employee's contract on the basis of unsatisfactory performance or if he/she proves unable to meet the expected level of performance or unsuitable for a position, despite the provision of appropriate support for improvement as set out above [in the provisions regarding PIPs]."). The Global Fund objects that as the complainant could challenge the decision to place her on a PIP, it cannot be considered that she signed the separation agreement under duress. The objection is not convincing. Every unlawful action vitiating consent, by its very nature, can be challenged, but even if it is not challenged this does not exclude the possibility that the consent may be vitiated. It must be noted that the lawfulness of the decision to offer the PIP was not considered to be settled but was a fundamental element of the process which led to the separation agreement. The complainant's consent was vitiated by the fact that if she did not sign the separation agreement, she would have had to go through the PIP for which she was not eligible. Therefore, the Tribunal considers that the Global Fund imposed undue pressure which persuaded the complainant to consent to the separation agreement.

9. The Global Fund submits that it cannot be precluded from taking steps to improve its employee's skills or performance in all cases other than where underperformance had been documented. With regard to this issue, the organization observes that:

"[w]hile it was considered that certain staff members were already prepared to adapt to the new increased responsibilities, for various other staff members (including the Complainant) it was considered that their competencies and/or skills needed improvement to meet the heightened requirements attached to the post. For those staff members, it was considered that performance support would be needed to allow them the opportunity to develop any lacking skill or competencies."

The Tribunal recognizes that international organizations have the discretion to manage their performance management objectives but highlights that they must do so using the tools they have in the manner in which they are designed. In the present case, the Global Fund used a tool (the PIP) which is explicitly designed to correct identified underperformance, to address an issue of potential future underperformance. The Tribunal finds the misuse of the PIP to be an abuse of authority which rendered the process non-transparent and arbitrary, as according to the defendant's allegations the option of going through the PIP could be offered indistinctly to each employee.

10. In light of the above, the separation agreement must be set aside. However, as the complainant does not seek reinstatement, and the Tribunal finds that there is no need to renegotiate the terms of her separation, the complainant shall keep the sums paid to her in accordance with the separation agreement and is entitled to an award of moral and material damages as well as costs. The complainant had a reasonable expectation of career as she had consistently received positive appraisal reports in the years she worked at the Global Fund and as her position was mapped into the new structure. Taking into account the amount she was paid (approximately 185,000 Swiss francs) as part of the enhanced separation package offered in the separation agreement, the Tribunal awards material damages for the loss of income and loss of career opportunity in the amount equivalent to three months' gross salary in accordance with the rate of her last salary payment. For the abuse of power and the violation of the Global Fund's duty of care stemming from the unlawful acts leading to the complainant's separation, the Tribunal awards the complainant moral damages in the amount of 50,000 Swiss francs. As the complainant succeeds, she is entitled to costs in the amount of 1,000 Swiss francs. The Tribunal shall not grant the complainant's request to order that the General Manager's behaviour be condemned as that is outside the Tribunal's remit. The counterclaim that the complainant be ordered to pay costs must be rejected as the complainant succeeds in part.

DECISION

For the above reasons,

1. The impugned decision of 13 December 2012 as well as the separation agreement of 29 March 2012 are set aside, as explained under 10, above.
2. The Global Fund shall pay the complainant the equivalent to three months' gross salary in material damages.
3. It shall pay her moral damages in the amount of 50,000 Swiss francs.
4. It shall also pay her costs in the amount of 1,000 Swiss francs.
5. The complainant's other claims are dismissed, as is the Global Fund's counterclaim.

In witness of this judgment, adopted on 28 October 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