

H.

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

121st Session

Judgment No. 3611

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Z. H. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter “the Global Fund”) on 10 January 2013 and corrected on 9 July, the Global Fund’s reply of 2 December 2013, the complainant’s rejoinder of 18 February 2014 and the Global Fund’s surrejoinder of 17 June 2014;

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 signed a separation agreement with the Global Fund that, according to him, was not honored.

On 29 April 2012 he signed the separation agreement dated 18 April 2012 by which he was to separate from service on 30 April 2012. He initialled each page of the agreement, including annex A which referred to his financial entitlements, annex B by which he agreed to retract his letter of 16 November 2011, and annex C which was the letter by which the employees against whom he had made some accusations in the letter of 16 November agreed to renounce the pursuit of any legal action against him in that respect. He returned the

signed agreement and annexes on 30 April 2012. In the covering e-mail he indicated that he had requested that the agreement be modified, which had been refused on the ground that the agreement was “in a standard form”. He nevertheless added that he was proceeding on the assumption that the Global Fund would honour the terms of his employment contract and asked it to confirm its position on the following issues: payment of tax equalisation, payment of the employer’s contributions to the Provident Fund as defined in his employment contract, preservation of the personal belongings he had left in his office until he could come to collect them, his request that the letter of retraction should not be circulated, payment of the benefits under the Sick Leave Under Insurance Cover (SLIC) until such time as he recovered from illness or until December 2012, whichever was the earliest, and communication of some documents that he had left in his office. He concluded by stating “[o]n that basis, I attach herewith the [...] agreement, which [I have] signed”.

On 7 May 2012 the Global Fund acknowledged receipt of the communication of 30 April stating that it agreed to be bound by the terms and conditions of the agreement despite its belated submission. It “[took] note” of the points raised therein and “reaffirm[ed]” the terms of the agreement. The separation of the complainant was thereby confirmed. On 29 October the complainant wrote to the Global Fund requesting to be paid the additional amounts due on the basis of the agreement (namely with respect to his accrued leave, his separation entitlements, the payment of his “[p]rofessional” subscriptions and payment of other “fees”) stressing that he had had no reply to the email he had sent earlier that month. He also requested confirmation as regards the availability of tax equalisation on all payments made to him, for provision of outplacement services and a letter of reference. On 31 October he was hand-delivered a letter from a law firm representing the Global Fund concerning his obligation to respect the confidentiality with respect to the retraction letter. A last payment was made on 25 November 2012, which according to the complainant did not cover all the amounts owed to him by the Global Fund.

Having received no reply to the communication of 29 October 2012, he filed a complaint with the Tribunal on 10 January 2013 pursuant to clause 10(vi) of the agreement, according to which any dispute relating to the honouring of payment obligations under the terms of the agreement should be brought to this Tribunal within three months of the alleged failure to honor the agreement. He filed his complaint with the Tribunal against the implicit rejection of his claim of 29 October 2012.

The complainant asks the Tribunal to order the payment of the remaining outstanding entitlements, i.e. full payment of medical expenses to be covered by the insurance company up to 12 December 2012, payment of the contributions to the Provident Fund up to 12 December 2012, payment of child allowance for all his dependent children and payment of the education grant for the 2012-2013 school year for all his eligible children at the time of separation, as well as payment of professional subscriptions for 2012. He also asks the Tribunal to order that “[t]ax equalisation [...] apply to all payments received”, to order that he benefits from the provision of outplacement services with an external company, to order that he be provided with a satisfactory letter of reference and that he be paid interest on all amounts due. He also claims compensation for moral and professional damages, and the award of costs. In his rejoinder, he acknowledged that some payments were made by the Global Fund but asked that it provides him with a proper and succinct breakdown in order for him to modify his claims. He specified that the entitlements paid to him with respect to separation seem to have been made on the basis of one wife and one child, whereas he had one wife and three children; he therefore asks that the Global Fund calculate his separation entitlements on that basis and pay his entitlements in full. He expands his claims for relief to include the payment of compensation for delay in the payment of his entitlements, and for “moral and professional damages due to the disclosure of confidential and settled issue”. He also claims the payment of the benefits due under the SLIC.

The Global Fund asks the Tribunal to dismiss the complaint as partially irreceivable and otherwise unfounded; and to order the complainant to pay all costs of the proceedings on a “full-indemnity basis”.

CONSIDERATIONS

1. The complainant commenced employment in a senior position, Chief Financial Officer, with the Global Fund on 10 January 2011 under a contract that concluded on 30 November 2013. His appointment was subject to a probationary period of six months though the contract provided for the extension of this period. The complainant was based in Geneva though his country of residence was Australia. In May 2011, the complainant suffered a breakdown and was hospitalised. He never returned to work. He relocated to Australia in August 2011 on medical advice.

In February 2012 negotiations commenced on the terms on which the complainant would leave the employ of the Global Fund. On 24 February 2012, the Global Fund proposed a basis for separation but it was rejected by the complainant. A second proposal was advanced by the Global Fund on 21 March 2012 but again it was rejected by the complainant. A third proposal was advanced by the Global Fund in a letter dated 18 April 2012. After an introductory paragraph, the letter set out the terms on which the complainant would be separated from the Global Fund. The letter was signed by the Global Fund's Head of Human Resources and Internal Communications Department. The offer was non-negotiable. As forwarded to the complainant, it contained a provision at the end in which the complainant could sign the letter immediately after a notation "I agree to the terms and conditions set out in this letter". The complainant did sign on 29 April 2012. On 30 April 2012 a signed copy of the separation agreement was sent to the Global Fund by the complainant's lawyer. Before these steps occurred, the complainant's lawyer had sought some amendments. However, the Global Fund had refused to agree to the proposed amendments.

2. There is an issue in these proceedings about whether the terms set out in the letter of 18 April 2012 encompass the entire agreement about the terms on which the complainant separated from the Global Fund. That is because in the letter of 30 April 2012 returning an executed copy of the agreement, the complainant's lawyer had written:

“As you are aware, my client had requested some slight amendments to the draft [separation] agreement, which you have refused to agree on the basis that the agreement is in a standard form. Whilst this is not strictly correct, my client is proceeding on the following basis;

[the letter then lists seven matters in respect of which the complainant had a particular understanding of the arrangements or reflected what he wanted the Global Fund to do. Two of the matters were based on the terms of the complainant’s original employment contract]

On that basis, I attach herewith the [separation] agreement which has been signed by my client, who has initialed every page. Please acknowledge safe receipt. My client will arrange to post the original to [the Global Fund].”

The Global Fund’s lawyer acknowledged receipt of this communication enclosing the signed agreement in a letter dated 7 May 2012 in the following terms:

“I acknowledge receipt of your letter of 30 April 2012 and of the mutually agreed separation agreement [...] countersigned by your client on 29 April 2012.

I am pleased to inform you that my client agrees to be bound by the terms and conditions of the [separation agreement] as signed by your client despite its belated submission. We take note of the points raised in your covering letter, and also reaffirm the terms of the [separation agreement]. As such, the separation of your client from the Global Fund by mutual agreement is hereby confirmed.”

3. The complainant argues that the additional matters referred to in the letter of 30 April 2012 constitute part of the separation agreement. The Global Fund argues that the terms on which the separation occurred were, and were limited to, the terms of the agreement in the letter of 18 April 2012. Quite clearly both the Global Fund in proposing the terms in the letter of 18 April 2012 and the complainant in signing a copy of the letter signifying agreement to the terms, did agree to the terms set out in that letter. One term, clause 15, provided that the agreement (necessarily a reference only to the agreement proposed in the letter of 18 April 2012) is based on full and final settlement of any and all contractual and/or statutory claims that he brings against the Global Fund. Acceptance of this term by the complainant militates against a conclusion that the additional matters raised by his lawyer in the letter of 30 April 2012 formed part of the agreement. Also, several of the

seven matters in the letter of 30 April 2012 were raised in a letter of 20 April 2012 from the complainant's lawyer to the Global Fund requesting agreement to them. The Global Fund responded by saying that the letter of 18 April 2012 would not be amended. That is to say, the Global Fund expressly refused agreement to what was being proposed in the letter of 20 April 2012. The Global Fund repeated, in further correspondence, on 27 April 2012 that the terms of the letter of 18 April 2012 were non-negotiable. In addition, the response of the Global Fund's lawyer in the letter of 7 May 2012 did not, when read objectively, signify acceptance, for contractual purposes, of the matters raised in the letter of 30 April 2012. It is true that the Global Fund's lawyer said in the letter of 7 May 2012 that the Global Fund "[took] note of the points raised in [the] covering letter" but that was in the context of an affirmation that the countersigned letter of 18 April 2012 constituted the terms and conditions on which the complainant would be separated from the Global Fund. In the result, the Global Fund is correct in arguing that the terms on which the separation occurred were, and were limited to, the terms of the agreement in the letter of 18 April 2012.

4. In his complaint, the relief identified by the complainant was expressed as:

- "1) Payment of remaining outstanding entitlements i.e.: accrued leave, separation entitlements, child's fees ...;
- 2) Tax equalisation to apply to all payments;
- 3) Provision of outplacement service with [a private company];
- 4) Provision of a satisfactory letter of reference;
- 5) Interest on all sums due;
- 6) Legal cost[s] and compensation for moral and professional damages."

5. The first claim does not particularise amounts outstanding and is, in its terms, somewhat vague. In the complainant's legal brief payment is claimed for first, medical expenses, secondly, contribution to the Provident Fund, thirdly, child allowances for all dependent children, fourthly, education grants for eligible children at the time of separation, fifthly, the cost of professional subscriptions and sixthly, tax equalisation.

The complainant also seeks that the Global Fund provides him with a letter of reference and professional outplacement services.

In his rejoinder, the complainant pursues payment in relation to six categories of claims. The first is family entitlements (which, as identified in the rejoinder, are expenses related to travel, removal allowance, repatriation grant and baggage allowance) that were calculated, the complainant argues, on the basis of a spouse and one child but should have been calculated on the basis of five people, namely the complainant, his spouse and three children. The second category is removal and relocation benefits in relation to which the complainant notes that it should have been calculated on the basis of his three children and not one. The third category relates to an education grant for the complainant's three children. The fourth category concerns payments under the SLIC. The fifth category concerns payments to the Provident Fund and the sixth category concerns subscriptions to professional publications. Also, in the rejoinder, the complainant pursues a claim that he be provided with a letter of reference and outplacement services. In addition, he seeks compensation for moral and professional damages due to the disclosure of confidential information, compensation for the delay in the payment of his entitlements and reimbursement of legal costs.

6. The Global Fund responds both in its reply and in its surrejoinder in the following way. In relation to removal and relocation the Global Fund notes that the separation agreement allowed the complainant to elect to be paid a lump sum. He made that election and was paid the specified amounts. The Tribunal accepts this is a complete answer to the complainant's claim. In relation to the repatriation grant, the separation agreement specified that the complainant would be paid this grant on the basis of a spouse and one dependent child. He was paid on this basis and the Tribunal is satisfied this is a complete answer to the complainant's claim. This deals with the first and second category discussed in the preceding consideration.

7. As to the third category, education expenses, the separation agreement provided for the payment of the education grant until 31 December 2012. In its surrejoinder the Global Fund particularises

payments made in July, September and October 2012 on the basis of school invoices provided by the complainant. The Global Fund argues, correctly, that the complainant has failed to establish an entitlement to any further amounts. The complainant says he “would welcome any breakdown of any funds paid by the Global Fund” and that “[w]ithout any breakdown from the Global Fund [he] will maintain [his] financial claim”. However this generalised assertion without supporting documentation provides an insufficiently firm evidentiary foundation for the Tribunal to conclude that the Global Fund has not met this obligation under the separation agreement.

8. In relation to the fourth and fifth categories, payments under SLIC and to the Provident Fund, the separation agreement made no provision for the former (though it was a matter addressed in the letter of 30 April 2012) and provided for the payment of an amount equivalent to the contributions the Global Fund would have made to the Provident Fund for a six-month period in respect of which the complainant was to be paid three months base salary in lieu of notice and another three months in lieu of reassignment. Again, this matter was addressed in the letter of 30 April 2012 but what is said in that letter is at odds with the terms of the letter of 18 April 2012 to which the complainant agreed. The complainant’s claim as particularised in the rejoinder is obscure. It appears to be partly based on the terms of the complainant’s initial contract and e-mail correspondence which results, so it is argued, in an obligation to pay additional amounts. However the complainant has failed to demonstrate that the Global Fund has failed to comply with its obligations under the separation agreement in either respect.

9. It is demonstrably the case that the payment of subscriptions to professional publications, the sixth category, was not a matter in respect of which payment was required under the separation agreement. In relation to the letter of reference, the separation agreement did contain a provision (clause 18) requiring the Global Fund to provide the complainant with a written reference. In its surrejoinder, the Global Fund states that if the complainant still wishes to receive this document, he can communicate with the Global Fund’s Human Resources Department.

This offer is sufficient to dispose of this aspect of the complainant's claims. As to outplacement services, the Global Fund says that the separation agreement made no provision concerning this matter. Literally, this is true. The complainant relies in the rejoinder on what all staff were told about outplacement services being provided on separation. However, this provides no basis for asserting a right to such services under the separation agreement. Nonetheless in correspondence with the complainant's lawyer immediately before the complainant signed the letter of 18 April 2012 signifying his agreement to its terms, the Global Fund said in a letter dated 27 April 2012 that if the complainant signed the 18 April 2012 letter (and also signed another letter retracting allegations the complainant had made in earlier internal correspondence and which, itself, was the subject of a term in the separation agreement), he would be provided outplacement assistance through a private company in Sydney.

10. At this point, it is desirable to note the basis on which the complainant brings these proceedings in the Tribunal. Clauses 10(vi) and 12 of the letter of 18 April 2012 provided that any claim for non-payment arising from a failure by the Global Fund to honour "payment obligations" (to use the expression in the letter) under the agreement could be pursued before the Tribunal directly and that the Global Fund's Human Resources Regulations concerning the pursuit of grievances and appeals internally had no application to the separation agreement. However, assuming these provisions enabling recourse directly to the Tribunal were legally efficacious (a matter about which there must be some real doubt), they had no application to claims not based on the separation agreement but based on rights said to arise under principles applicable to international civil servants, arising under the Regulations or arising contractually but not under the separation agreement. Claims in this latter three categories would have to, in the ordinary course, be dealt with by way of internal appeal so as to satisfy the requirements under the Tribunal's Statute that a complainant has exhausted internal means of redress.

11. Even if the commitment in the letter of 27 April 2012 to provide outplacement services is to be treated as a term of the separation agreement, it was not a provision creating a “payment obligation” which could be pursued in the Tribunal directly without recourse to internal appeal. This concept of payment obligation is, in this context, a reference to express obligations under the agreement as articulated in the letter of 18 April 2012 to pay specified money amounts. However, it is clear that the Global Fund committed itself to providing outplacement services and even in the absence of an order from the Tribunal, the Global Fund should honour this commitment if the complainant still desires assistance of this type. To continue to fail to do so, would be a clear violation of the Global Fund’s obligation to deal with its staff in good faith.

12. Three final matters need to be addressed. The first concerns confidential documents. In its reply, the Global Fund provided, as supporting evidence, the letter of 18 April 2012 in its entirety in the sense that it included three annexes to the letter. One annexure was clearly confidential though it was expressly referred to in one of the clauses in the separation agreement. Related correspondence was also provided to the Tribunal. The complainant submits in the rejoinder that the Global Fund acted with an improper motive and the disclosure showed a complete lack of good faith. In the rejoinder, part of the relief the complainant seeks is “[c]ompensation for moral and professional damages due to the disclosure of confidential and settled issue”. The Global Fund responds to this argument by saying in its surrejoinder that it was appropriate to provide the documents because the best evidence available should be offered in proceedings before the Tribunal (Judgment 1781, under 13) and confidentiality ordinarily is not a ground for withholding evidence (Judgments 2700, under 6, and 429, under 2). The Tribunal is satisfied that the provision of these confidential documents by the Global Fund cannot be criticised. While they are not central to the issues raised by the complaint, they nonetheless are relevant to understanding the entire basis on which the parties agreed on the terms of the separation of the complainant.

13. The second matter is a claim by the complainant that he be paid “compensation for the delay occurred in the payments of his entitlements”. However the complainant has not established any further amounts are required to be paid under the separation agreement and the payments actually made were paid within a reasonable period.

14. The last matter is a claim by the Global Fund that the complainant pays its costs of these proceedings. While there are authorities in which the Tribunal has made it clear that it has power to make such orders, this is not a case in which a costs order should be made against the complainant. There was a reasonable basis for arguing that the terms of the separation agreement were not exhaustively set out in the letter of 18 April 2012. If the complainant had succeeded on that point, he might have succeeded in relation to some of the claims he makes for additional payment.

In the result, both the complaint and the counterclaim should be dismissed.

DECISION

For the above reasons,

The complaint is 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