Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

119th Session **Judgment No. 3423**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Ms A. A.-N., Mr M. B. A., Ms K. B. B., Mr M. I. and Mr S. J. M. against the Global Fund to Fight AIDS, Tuberculosis and Malaria on 19 June 2012 and corrected on 4 October 2012, the Global Fund's reply of 17 January 2013, the complainants' rejoinder of 26 April and the Global Fund's surrejoinder of 5 August 2013;

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 none of the parties has applied;

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

A. At the material time, all the complainants were working under a permanent contract in the Grant Management Division of the Global Fund.

At its 25th meeting, held in November 2011, the Global Fund Board approved a consolidated transformation plan to improve the organisation's performance. Between 21 and 23 March 2012 the complainants were called to a meeting with the Director of the above-mentioned Division and a manager from the Human Resources Department (HRD) during which, on account of the restructuring process and ensuing changes in operational priorities, they were

offered a separation agreement, dated 21 March, whereby they would be placed on special leave with pay until 30 April 2012, the date on which their contract would end, would receive a termination indemnity and six months' basic salary in lieu of notice and in lieu of reassignment and would forgo any right of appeal. The complainants signed the agreement on the day of the meeting. On 28 March they wrote to the General Manager to request a larger indemnity. On 19 April they received the reply that the management of the organisation did not wish to reopen discussions on the amount of compensation granted to them. They requested a review of this decision in an e-mail dated 25 April and on 19 June 2012 they filed their complaints with the Tribunal.

B. The complainants submit that their complaints are receivable under Article VII, paragraphs 1 and 3, of the Statute of the Tribunal, since the implied rejection of their request of 25 April 2012 occurred after they had separated from service.

On the merits the complainants contend that the "aggressive" and "threatening" context surrounding their signature of the agreement invalidated their consent, which according to well-established precedent renders the separation agreements null and void. They explain that, at the meeting, they were told that if they did not sign the agreements immediately, a performance improvement plan would be implemented which, it was intimated, would be doomed to fail and which would lead to their separation without compensation for unsatisfactory performance. The complainants tax the Global Fund with springing a surprise on them, as the quality of their performance had never previously been an issue and they did not think that they were concerned by the restructuring process, since its purpose was to strengthen the organisation's grant management. They emphasise that they never received a copy of their allegedly negative performance evaluation.

Referring again to the Tribunal's case law, the complainants contend that they were not given any assistance or a period of reflection.

The complainants seek the setting aside of the impugned decision, that of 19 April 2012 and the separation agreement signed by each of

them. They all also claim two years' salary as damages for moral and material injury and costs in the amount of 10,000 euros. Lastly, they ask the Tribunal to find that, should these various sums be subject to national taxation, they would be entitled to a refund of the tax paid from the Global Fund.

C. In its reply the Global Fund, which is represented by an "associate" of a law firm, submits that the complaints are irreceivable because internal means of redress have not been exhausted. Some six weeks elapsed between the date on which the complainants signed their separation agreement and the date on which their employment ended. During that time they could have initiated the internal appeal procedure. In addition, the Appeal Board has always considered that it is competent to rule on disputes submitted by former employees. The Global Fund argues that the complaints are also irreceivable because, by signing the aforementioned agreement, the complainants waived any right of appeal.

Relying on Judgment 1934, the Fund maintains that if there is no evidence that pressure was brought to bear, a complainant may not call into question the terms of the separation agreement which he or she has signed. The complainants have not substantiated their allegations. The organisation contends that the criteria established by the case law which may lead the Tribunal to hold that consent is not valid are not met in the instant case. Although the complainants signed the document immediately on 21 March 2012, they did so of their own free will. They would have been given a little more time, if they had asked for it. Since Mr I. was given extra time, he cannot contend that he had insufficient time to study the offer made to him.

Moreover, the Global Fund explains that, since the restructuring process led to a redefinition of posts of the kind held by the complainants, some of the staff concerned were asked to undergo a performance improvement plan aimed at enabling them to fit successfully into the new structure. However, as it was presumed that some employees "would not wish to invest the effort necessary for the

success of such a plan", it was decided to offer them a generous separation agreement.

The Global Fund submits that since Mr M. and Mr B. A. found another job in August 2012 and October 2012 respectively, they suffered no financial injury. As it considers the complaints to be vexatious, it asks the Tribunal to order the complainants to bear costs.

D. In their rejoinder the complainants comment that the Global Fund's counsel does not have the capacity to represent the organisation in accordance with Article 5, paragraph 3, of the Rules of the Tribunal.

Referring to the case law, they submit that they could not lodge an internal appeal against a decision taken after 30 April 2012 because no provision has been made for former employees to have access to internal means of redress, and that the Global Fund ought to have forwarded their grievance of 25 April 2012 to the competent authority or to the Appeal Board. They hold that the four stages of the internal appeal procedure at the Global Fund excessively delay the processing of disputes. As they consider that the internal appeal mechanisms are "extremely poorly designed", they argue that they are unlawful and that employees should not therefore be bound by them.

On the merits the complainants press their pleas. They submit that, as the organisation has acknowledged, since the signing of the separation agreements, that their 2011 performance evaluations – which in their case did not even record unsatisfactory performance – were flawed, those agreements are null and void. In their view, the Administration's wrongful conduct is so serious in this case that it amounts to harassment, and the sums paid to them are insufficient to redress the injury done to them by the unlawful termination of their appointments and the affront to their dignity.

E. In the surrejoinder which the Global Fund's counsel has filed on its behalf, he explains that he is fully entitled to represent the Fund as he is a lawyer.

As far as receivability is concerned, he submits that the letter of 28 March 2012 could not be regarded as an appeal. On the merits, he

says that the separation agreements were not the outcome of the 2011 performance evaluations.

CONSIDERATIONS

1. The five complainants, who were employed by the Global Fund under a permanent contract, all worked in the Middle East and North Africa Team in the Grant Management Division.

Between 21 and 23 March 2012 they were called to individual meetings which were plainly part of the process of implementing the Fund's recently adopted "consolidated transformation plan", where they were offered a separation agreement in circumstances described in radically different terms by the parties to the dispute.

On the same day, the complainants agreed to sign this document, taking the form of a letter from the Head of the Human Resources Department ("HR Director"), in which they consented to separating from the Fund on 30 April 2012, being placed on special leave up to that date and receiving a termination indemnity and a sum equivalent to six months' basic salary.

2. Although the agreements in question included clauses whereby the complainants waived any right of appeal, they immediately protested about the way in which they had been treated and contended that they had not freely consented to these agreements.

After a meeting with the General Manager on 24 March 2012, the complainants wrote a letter to him on 28 March to contest the validity of the "Management's decision to terminate [their] appointment", again to denounce the circumstances in which they had been led to sign a separation agreement and to request "better compensation for [their] injury".

On 19 April the HR Director replied that the Fund "[did] not wish to reopen discussion on the amounts and benefits offered under the terms of the [separation agreement]" signed by each of them.

By an e-mail of 25 April, the complainants, raising several new arguments, asked the HR Director to "reconsider [her] decision". This e-mail went unanswered.

3. It was against this background that on 19 June the complainants filed their complaints with the Tribunal seeking the setting aside of the implied decision arising out of the Fund's silence with regard to their grievance of 25 April, as well as compensation for the material and moral injury which they considered they had suffered "on account of and upon the termination of [their] appointment".

4. As the five complaints seek the same redress and rest on submissions which are, for the most part, identical, they shall be joined to form the subject of a single ruling.

5. In their rejoinder, the complainants contest the receivability of the Fund's reply, on the grounds that it was submitted by a person who did not have the requisite capacity. However, the Fund's submissions are signed by a lawyer who is a member of the bar in Member States of international organisations that have recognized the jurisdiction of the Tribunal, and who has produced a power of attorney duly issued by the Fund. He is consequently entitled, under Article 5, paragraphs 3 and 4, of the Tribunal's Rules, to represent the Fund in the present case.

6. The Fund contends that the complaints are irreceivable pursuant to Article VII, paragraph 1, of the Statute of the Tribunal, because the complainants did not exhaust the internal means of redress available to them before their complaints were filed.

7. To counter this objection, the complainants mainly argue that, as they were no longer employees of the Fund after 30 April 2012, they could not avail themselves of these internal remedies to challenge an implied decision arising after that date.

This argument is unfounded.

(a) It is true that, contrary to the Fund's submissions, its former employees do not have access to the internal appeal procedure for which the applicable regulations make provision. Indeed, the regulations in force at the material time, as well as those which replaced them with effect from 1 August 2012, provide that the internal means of redress are open to "employees", but there is nothing in the texts governing the organisation's staff which specifies that this term also refers to former employees. The Tribunal has already had occasion to find, with regard to other international organisations' staff rules and regulations couched in similar language, that in the absence of any indication to the contrary in the applicable texts, this term must be interpreted as referring solely to serving staff members (see, in particular, Judgments 2840, under 17 to 21, 2892, under 6 to 8, or 3074, under 11 to 13). The Fund's argument that, in practice, the Appeal Board has so far agreed to consider appeals filed by former employees is no bar to the application of that case law.

(b) However, in the instant case, the sequence of events set out above shows that the complainants were notified of the termination of their employment with the Fund, which resulted from the actual terms of the separation agreement to which they were party, as early as 21, 22 or 23 March 2012, even though that termination was to take effect only on 30 April, that is more than five weeks later. Before leaving the organisation, they thus had sufficient time to lodge an internal appeal against the disputed decisions, and the fact that they subsequently ceased to be employees of the Fund did not deprive them of the possibility of pursuing those proceedings to the end (see, for a similar case, Judgment 3202, under 10). Indeed, the question whether an employee separating from an organisation has access to the internal means of redress must be determined, for the entire appeal procedure, at the date on which he or she receives notification of the decision he or she intends to challenge, and subsequent events have no bearing on this issue (see also *a contrario* the above-mentioned Judgments 2892, under 8, and 3074, under 13).

8. The complainants' contention that the provisions governing the internal means of redress applicable to the Fund's staff are unlawful because they are "extremely poorly designed" and that employees should not therefore be bound by them is equally unfounded.

The Tribunal is aware of the fact that the mechanisms under the Grievance and Dispute Resolution Procedure which was in force at the material time were highly complex as they comprised no less than four successive levels of appeal, depending on the nature of the disputed decision. Where, as in the present case, the dispute concerned a decision taken by HRD, the four stages provided for in section 3.2.5 of this text consisted in review by the manager of the human resources team concerned, a facilitated resolution meeting convened by the Director, appeal to the Director of Corporate Services and appeal to the Appeal Board.

Nevertheless, the undeniable complexity of the procedure, which probably helps to explain why it has since been substantially modified, does not in itself render unlawful the provisions which established it. Subject only to what is said under 9(c) below, employees of the Fund were therefore bound by them.

9. However, the Tribunal notes that, in fact, the complainants did initiate the prescribed internal appeal procedure, but that it was simply interrupted before completion.

(a) Indeed, there can be no doubt that the aforementioned letter of 28 March 2012 was an appeal against the disputed documents. According to the Tribunal's case law, for a letter addressed to an organisation to constitute an appeal, it is sufficient that the person concerned clearly expresses therein his or her intention to challenge the decision adversely affecting him or her and that the request thus formulated can be granted in some meaningful way (see Judgments 461, under 3, 1172, under 7, 2572, under 9, and 3067, under 16). Given the content of the letter in question, which is summarised in consideration 2 above, these conditions are clearly met in this case and the defendant is therefore wrong in contending that it was "a vague letter" merely

expressing "dissatisfaction". By sending this letter, the complainants initiated the first stage of the internal appeal procedure described above.

The negative reply of 19 April 2012 put an end to this first stage. In the particular circumstances of this case, it must also be deemed to have put an end to the second stage, since it came from the HR Director and the evidence shows that it was preceded by a meeting between that person and each of the complainants, which can be equated with the Facilitated Resolution Meeting provided for in the Grievance and Dispute Resolution Procedure.

The Fund should therefore have considered the complainants' e-mail dated 25 April 2012 challenging that reply to be an appeal filed at the third stage of the internal appeal procedure with the authority competent to hear it, that is, in accordance with the provisions in force at the material time, the Director of Corporate Services. It should also be noted that the complainants filed it within ten working days, the time limit set by the combined provisions of sections 3.2.5 and 3.3.1 of the above-mentioned text.

(b) It is true that the two successive appeals thus lodged by the complainants were not submitted to the authorities competent to hear them. But consistent precedent has it that, although rules of procedure should ordinarily be strictly complied with, they must not set traps for staff members who are defending their rights and therefore they must not be construed with too much formalism. Consequently, an appeal submitted to the wrong authority is not irreceivable on that account and it is for that authority, in such circumstances, to forward it to the one which is competent, within the organisation, to hear it (see, for example, Judgments 1832, under 6, 2882, under 6, or 3027, under 7).

(c) In this case, a particular difficulty, for which the Fund was responsible, made it impossible to pursue the internal appeal procedure in the normal way. Indeed, the post of Director of Corporate Services was abolished in February 2012 and the duties exercised by the holder of that post were not specifically transferred to another authority. At the material time, section 3.2.5 of the Grievance and Dispute Resolution

Procedure providing for an appeal to the said director, which had not been amended accordingly, had thus become inapplicable.

10. As there was no response to the appeal of 25 April 2012 within sixty days of the date on which it was lodged, pursuant to the provisions of Article VII, paragraph 3, of the Statute of the Tribunal it must be deemed to have been implicitly rejected, and that implied decision may be impugned by the complainants before the Tribunal.

In this case, the time limit in question had not actually expired when the complaints were filed with the Tribunal, but given that the aforementioned decision arose in the course of the proceedings before the Tribunal, the complaints, though filed prematurely, may be considered to have been corrected in this respect (for a similar case, see Judgment 3356, under 15 and 16).

11. It is clear that this implied decision is unlawful. The mere fact that the Fund rendered it impossible for the complainants' appeal to be dealt with in accordance with the applicable rules, owing to the abolition of the post of the authority competent to hear it, is sufficient to vitiate the decision taken on this appeal.

12. The Tribunal will not, however, examine the merits of the complaints in these proceedings.

When it transpires that the internal appeal procedure in force in an international organisation has not been followed properly, the Tribunal often decides – in some instances on its own initiative – to remit the case to the organisation, in order that the competent appeal bodies can hear it, rather than examine its merits (see, for example, Judgments 1007, 2341, 2530, 2781 or 3067).

In the present case, that approach is clearly appropriate, for two reasons.

(a) First, it should be recalled that, as the Tribunal's case law has long emphasised, the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority (see, for example, the above-mentioned

Judgments 2781, under 15, and 3067, under 20). This is especially true since internal appeal bodies may normally allow an appeal on grounds of fairness or advisability, whereas the Tribunal must essentially give a ruling on points of law. Consequently, although in this case the complainants themselves were mistaken as to their right to resort to the internal appeal procedure, it would be inappropriate to deprive them of the benefit of that procedure.

(b) Secondly, apart from the fact that the review of a disputed decision in an internal appeal procedure may well suffice to resolve a dispute, one of the main justifications for the mandatory nature of such a procedure is to enable the Tribunal, in the event that a complaint is ultimately lodged, to have before it the findings of fact, items of information or assessment resulting from the deliberations of appeal bodies, especially those whose membership includes representatives of both staff and management, as is often the case (see, for example, Judgments 1141, under 17, or 2811, under 11). As rightly pointed out by the defendant, the Appeal Board plays a fundamental role in the resolution of disputes, owing to the guarantees of objectivity derived from its composition, its extensive knowledge of the functioning of the organisation and the broad investigative powers granted to it. By conducting hearings and investigative measures, it gathers the evidence and testimonies that are necessary to establish the facts, as well as the data needed for an informed assessment thereof.

In the present case, it appears to the Tribunal all the more essential to have this background knowledge, since the parties essentially rely on statements giving profoundly different accounts of what actually happened during the individual meetings that were held in camera. It is particularly important to determine whether, as the complainants submit, they were "threatened", during these meetings, with being subjected to a performance improvement plan setting unattainable objectives, and with then being dismissed without compensation for unsatisfactory performance. It is also necessary to verify the truth of the complainants' assertion that their consent to the disputed agreements was obtained by misrepresenting the content of their last performance evaluation, which according to the complainants

involved an unlawful weighting, and to establish the factual circumstances in which the meetings in question took place especially with regard to the possibility of being assisted by a third party, or having time for reflection. It is clear that, on these points, the submissions before the Tribunal would benefit from being significantly supplemented with information gathered during the internal appeal procedure.

13. The defendant raises a second, more fundamental objection to the receivability of the complaints, namely that the complainants, by signing the separation agreements, waived their right to challenge either the validity or the content thereof. However, since, as just stated, the complainants contend that they signed these agreements under pressure and misrepresentation that vitiated their consent, the question of receivability is inseparable from the merits of this case. At this stage, the Tribunal will not, therefore, rule on this issue, which must also be examined in the course of the internal appeal proceedings, the main purpose of which will be to ascertain whether these allegations are true.

14. It follows from the foregoing that the implied decision rejecting the complainants' appeal filed on 25 April 2012 must be set aside and the matter remitted to the Fund for the resumption of the internal appeal proceedings which were unduly interrupted.

In view of the abolition of the post of Director of Corporate Services, to which reference was made above, the third stage of those proceedings, as provided for in the aforementioned text, will have to be omitted and the proceedings will have to be resumed directly at the fourth stage, that is, referral to the Appeal Board, so that the latter can make a recommendation to the Executive Director.

The complainants will therefore have to lodge an appeal with the Appeal Board within 60 calendar days of the delivery of this judgment. The procedure before the Board will be that which is laid down in the regulations governing the functioning of the Board in force at the time when the matter is referred to it.

15. Since they succeed in part, the complainants are entitled to costs, which the Tribunal sets at 1,500 euros for each of them.

16. The complainants request the Tribunal to find that, should the sums awarded to them be subject to national taxation, they would be entitled to a refund of the tax paid from the Global Fund. However, in the absence of a present cause of action in this respect, the claim must be dismissed as irreceivable (see, for example, Judgments 3255, under 15, or 3270, under 10).

17. The Fund requests, as a counterclaim, that the complainants be ordered to pay costs. But the very fact that the complainants succeed in part is sufficient to demonstrate that their complaints were not vexations and that this claim must therefore be rejected.

DECISION

For the above reasons,

1. The implied decision rejecting the appeal jointly filed by the complainants on 25 April 2012 is set aside.
2. The complainants' cases are remitted to the Global Fund so that the internal appeal proceedings may be resumed, as indicated under consideration 14, above.
3. The Fund shall pay each complainant 1,500 euros in costs.
4. The complainants' other claims are dismissed, as is the Fund's counterclaim.

In witness of this judgment, adopted on 14 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

(Signed)

GIUSEPPE BARBAGALLO PATRICK FRYDMAN MICHAEL F. MOORE

DRAŽEN PETROVIĆ