

M.

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

123rd Session

Judgment No. 3750

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms L. M. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter “the Global Fund”) on 14 April 2014, the Global Fund’s reply of 7 August, the complainant’s rejoinder of 17 October 2014, the Global Fund’s surrejoinder of 22 January 2015 and the additional documents submitted at the request of the Tribunal by the complainant on 5 August 2016 and by the Global Fund on 11 August 2016;

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 her separation from service under a separation agreement.

In 2012 the Global Fund underwent a significant restructuring. Some employees were identified as requiring support with regard to their abilities to meet the requirements expected pursuant to the Global Fund’s restructuring and new objectives. They were offered two options: continue working in the same role while agreeing to participate in a work program (Performance Improvement Plan – PIP) aimed at ensuring

success in their new position, or accept a mutually agreed separation settlement.

On 22 March 2012 the complainant was offered the possibility of a separation agreement on the basis of serious concerns regarding her performance. The following day she wrote to the Head of her Division, the Grant Management Division, setting out her concerns about the basis of this offer. Further communications were exchanged in which she requested her performance appraisal report for 2011. The complainant then went on sick leave on 1 May 2012, initially for a month but it was extended up to 31 October 2012. However, in mid-May she signed a separation agreement, which was subsequently amended in October and in December 2012. According to the final version of this agreement, she separated from service on 31 October 2012 and was placed on special leave with pay from 1 November 2012 until 31 May 2013. The separation agreement provided expressly that she would not file any appeals or claims against the Global Fund arising directly or indirectly from any decision, action or event taken or occurring during the period of her employment with the Global Fund.

On 22 April 2013 the complainant filed an internal appeal with the Appeal Board alleging violation of the performance management procedure and contesting the procedure leading to the termination of her contract through a separation agreement. She asked to be provided with her 2011 performance appraisal report, to be awarded financial compensation for the Global Fund's negligence, bad faith, breach of duty of care, and for moral prejudice. She also sought reinstatement, "[f]inancial reparation" for having signed a separation agreement under pressure and for having given up her career at the Global Fund under allegations of underperformance, and the "[s]ymbolic condemnation" of the Global Fund for showing lack of respect in dealing with her case.

On 23 January 2014 the Appeal Board issued its report indicating that it had found no evidence of unlawful or undue pressure with respect to the signature of the separation agreement. In light of the terms of the agreement, it considered that the appeal was irreceivable and recommended rejecting the complainant's claims. However, it found that the management of the case by the Administration may have had a

detrimental impact on the complainant's professional reputation and health and recommended that she be awarded two to three months' salary in compensation. It also recommended that the Administration provide her with a letter stating that the separation agreement was not based on underperformance, if she so wished.

By a Note of 7 February 2014, which is the impugned decision, the Executive Director notified the complainant that he had decided not to grant her any additional awards beyond those provided for in the separation agreement. He emphasised that the separation agreement was a final and legally binding agreement and that she had accepted not to avail herself of the grievance and dispute resolution procedure.

The complainant asks the Tribunal to order the Global Fund to provide her immediately with her full 2011 performance appraisal report and an "appropriate letter of reference mentioning her good performance", and to compensate her for Global Fund's negligence, undue delay and bad faith in the handling of the evaluation procedure. She also asks the Tribunal to order her reinstatement with full rights, or, if that is not possible, appropriate compensation for the loss of her job. She further seeks moral damages, "[f]inancial reparation" and reimbursement of legal fees.

The Global Fund asks the Tribunal to dismiss the complaint as manifestly irreceivable and without merit. It makes a counterclaim for costs.

CONSIDERATIONS

1. The complainant impugns the decision of 7 February 2014 by which the Global Fund's Executive Director, partially endorsing the Appeal Board's recommendation of 23 January 2014, decided that:

- "(1) The [separation agreement] signed between the Global Fund and the [complainant] must be considered as a final and legally binding agreement, as confirmed by the Appeal Board. The [separation agreement] must therefore be applied and given effect.

- (2) The [complainant]’s appeal is irreceivable, because it is inconsistent with her undertaking not to file an appeal and not to avail herself of the Grievance and Dispute Resolution Procedure ([separation agreement], section[s] 6(ii), 7).
- (3) On the merits, the [complainant]’s claims cannot be entertained, as the [complainant] has settled any and all claims against the Global Fund by virtue of her signature of the [separation agreement] ([...] sections 6(v), 10).
- (4) Therefore the [complainant] will not be granted any additional awards beyond those described in the [separation agreement].”

2. The complainant bases her complaint on the following grounds: (a) the process which led to the signature of the final, revised version of the separation agreement was flawed as it was misleading because it was based on her alleged underperformance and signed without her having seen her 2011 performance appraisal report which, when eventually shown, revealed no underperformance; (b) the contested process violated Human Resources Regulation 11 as well as Article 1 of the Section on managing underperformance that is part of the Human Resources Procedures according to which the PIP can be established when underperformance is recognized; (c) there had been an undue delay in providing her 2011 performance appraisal report; and (d) the official recognition by the Head of the Human Resources in an email of 9 April 2013 of irregularities in the performance appraisal process for 2011 cannot be deemed a regularization *a posteriori* of the performance appraisal process at the time of the challenged facts.

3. The Global Fund contests the complaint’s receivability and makes a counterclaim for costs as it considers the complaint to be vexatious, in breach of the separation agreement, and an abuse of process. With regard to the receivability of the complaint, the Global Fund submits that the complainant did not raise the issue of the validity of the separation agreement or request that it be annulled in her internal appeal or in her complaint before the Tribunal and that the complainant, by signing the separation agreement, waived her right to challenge its validity due to the clause it contained in paragraph 6(ii) which provided: “You certify that you have not filed and irrevocably agree that you will not file, assert or pursue, in any forum, any appeals or claims against

the Global Fund or against any directors, officers or staff members (both former and current) of the Global Fund arising directly or indirectly from any decision, action or event taken or occurring during the period of your employment with the Global Fund, or for any other reason.” On the merits it argues that the complainant’s contract was not terminated on grounds of performance. It contends that “skillsets and competencies, capacity for adaptation to the new organizational environment and perceived employee fit with the Organization (which could affect future performance) were considered important determinants for the inclusion in the [separation agreement] list”.

4. The Tribunal has already dealt with these issues in a similar case against the Global Fund (see Judgment 3610). The reasoning in that case is equally applicable to the present case.

5. The complaint is receivable. The Tribunal observes that the complainant challenged the validity of the separation agreement by arguing in her internal appeal, *inter alia*, that “[t]he procedure leading to the termination of her contract and signature of the [separation agreement] under undue pressure was based on an irregular performance evaluation process and bias deserving appropriate moral and financial compensation”. In its report, dated 23 January 2014, the Appeal Board noted that the complainant “consider[ed] that the decision to terminate her contract [was] in breach of the former Performance Management Procedure and HR Regulation 11 on Performance Management” and under the question of receivability it dealt with the validity of the separation agreement, reaching the conclusion that the separation agreement was valid as it “found no evidence of unlawful threats or pressure used to compel the [complainant] to sign the document”. Moreover, the Executive Director acknowledged in the impugned decision that “[t]he Appeal Board reviewed the allegation of duress and rejected it”. In her complaint, the complainant states that the process which led to the signature of the separation agreement was flawed and, consequently, asks to be reinstated, which implies annulling the separation agreement. The Global Fund’s objection to receivability, based on the argument that the complainant waived her right to challenge the validity

or the content of the separation agreement, does not preclude the Tribunal from examining the validity of that agreement as, if it is found to be invalid, none of the clauses can be upheld (see Judgment 3610, under 6).

6. With regard to the validity of the separation agreement, the Global Fund's assertion that the complainant's contract was not terminated on grounds of underperformance, but instead on the evaluation of the complainant's capacity for adaptation to the new organizational environment, is untenable in fact and in law. In fact, this assertion is belied by the email sent to the complainant on 4 April 2012 by the Senior Human Resources Business Partner, who stated *inter alia*: "Please be very clear, that the reason that you were offered the option to separate on a [separation agreement] was due to serious concerns regarding performance. Should you opt not to separate on a [separation agreement] and to remain, you are subject to the HR Policies, Regulations and Procedures as are all Global Fund employees. If it is determined that your performance warrants a Performance Improvement Plan [PIP], you may appeal the decision on performance but pending the outcome of the Appeal process, you would be obliged to conform with the process for managing underperformance." It is also belied by the email of 10 April 2012 from the Head of the Grant Management Division to the Staff Council, in which it was stated that "[o]f the 18 employees in Grant Management [including the complainant] who were exceptionally offered the option of a [separation agreement] on grounds of performance (despite their positions having been mapped into the new structure), all but five have signed the [separation] agreement".

7. In law, the complainant was offered the choice of a separation agreement or to be put on a PIP, which, according to Human Resources Regulation 11 and Article 1.3 of the section on managing underperformance within the Human Resources Procedures, presupposes that her performance did not meet expectations. Specifically, Article 1.3 in force when she was offered the separation agreement provided:

"1.3 Definitions

1.3.1 Underperformance

Underperformance refers to an employee who does not meet the agreed expectations for his or her workplan or developmental objectives set for the performance management cycle.

1.3.2 Performance Improvement Plan (PIP)

Where underperformance is recognized, a Performance Improvement Plan (PIP) is established to clarify areas needing improvement, to set up any necessary developmental activities and to define the follow-up plan.”

The complainant was offered the choice of staying with the Global Fund on the condition that she successfully completed a PIP, or signing a separation agreement and thereby ending her employment relationship with the Global Fund. The process which led to the separation agreement was vitiated by two serious flaws. As the Appeal Board noted in its report, “the Organization provided the [complainant] with misleading information in March 2012. [The Appeal Board] found no underperformance issue in the [complainant]’s 2010 and 2011 [Performance Appraisal] Dialogues; though incomplete, both showed that she had achieved most objectives and incidentally had exceeded expectations for two of them.” The complainant was not eligible to be put on a PIP as she had consistently met the expected levels of performance in all of her performance appraisal reports prior to the offer of the separation agreement. By leading the complainant to believe that she had underperformed, the Global Fund abused its authority and put the complainant under unlawful pressure, which vitiated her consent in signing the separation agreement, which she did under the false impression that she had underperformed. As the offer of a PIP was unlawful, the separation agreement signed by the complainant is null and void on the grounds that she signed it under duress.

8. As already stated in Judgment 3610, under 9, “[t]he 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."

9. In light of the above, the separation agreement is null and void and the Tribunal will order the complainant's reinstatement to be effected within one month of the delivery of this judgment. The Global Fund shall pay the complainant an amount equivalent to all salaries, allowances and benefits she was entitled to, including any contribution the Global Fund would have paid to the Provident Fund, from the date of separation from service to the effective date of her reinstatement, plus 5 per cent interest per annum from due dates less the amount paid through the separation agreement and any net earnings received in that period. If the Global Fund fails to reinstate the complainant and pay all amounts owed within one month of the delivery of this judgment, it shall pay the complainant interest at a rate of 20 per cent per annum until both requirements are fulfilled. 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, taking into account the complainant's reinstatement, the Tribunal will award the complainant moral damages in the amount of 10,000 Swiss francs. As the complaint succeeds, the complainant is entitled to costs in the amount of 2,000 Swiss francs and the counterclaim that she be ordered to pay costs must be rejected. The Tribunal shall not grant the complainant's request for immediate provision of the full 2011 performance appraisal report and an appropriate letter of reference mentioning her good performance, as the 2011 evaluation has been annulled and, the Tribunal having ordered her reinstatement, she no longer needs the letter of recommendation.

DECISION

For the above reasons,

1. The impugned decision of 7 February 2014 is set aside and the separation agreement must be considered null and void.

2. The Global Fund shall reinstate the complainant within one month of the delivery of this judgment.
3. The Global Fund shall pay the complainant material damages as detailed under consideration 9, above.
4. It shall pay her moral damages in the amount of 10,000 Swiss francs.
5. It shall also pay her costs in the amount of 2,000 Swiss francs.
6. The complainant's other claims are dismissed, as is the Global Fund's counterclaim.

In witness of this judgment, adopted on 18 October 2016, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 November 2016.

CLAUDE ROUILLER

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

DRAŽEN PETROVIĆ