Organisation internationale du Travail
*Tribunal administratif*

International Labour Organization
*Administrative Tribunal*

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

# O.-W. (No. 3)

***v.***

# Global Fund to Fight AIDS, Tuberculosis and Malaria

**120th Session** **Judgment No. 3507**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms E. O.-W. against the Global Fund to Fight AIDS, Tuberculosis and Malaria on 20 March 2014, the Global Fund's reply of 1 July, the complainant's rejoinder of 15 October 2014 and the Fund's surrejoinder of 22 January 2015;

Considering the documents produced by the parties in response to the Tribunal's request for further submissions;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant requests the payment of various sums in consequence of the decision to grant her a permanent disability benefit.

The complainant entered the service of the Global Fund in February 2004 as Executive Assistant to the Executive Director. She was absent owing to illness on several occasions between November 2006 and March 2007. When she returned to work, a new Executive Director was on the point of taking office. The complainant states that he deprived her of any duties and sidelined her. On 7 January 2008 her post was abolished and she was reassigned. On 1 January 2009 she received a contract of continuing duration.

On 2 February 2009 the complainant was placed on sick leave. After 130 working days of sickness absence on full pay, she was granted "sick leave under insurance cover". Under the Accident and Invalidity Insurance Regulation, she thus continued to receive her full pay and the allowances to which she was entitled until the end of a period of 260 days of absence, in other words until 6 August 2010.

As on 1 November 2010 the complainant had submitted a claim for a disability benefit, she was examined by her own attending physicians who concluded that her health problems were service-incurred and formulated a guarded prognosis as to her fitness to resume work. In March 2011, at the insurance company's request, she underwent a medical examination. According to the resulting medical report of 16 March, she suffered from total professional incapacity ascribable to harassment at work and it was "most unlikely" that she would return to work "within 6 months, or even a year". The complainant did not receive a copy of this report until September 2011.

By a letter of 30 May 2011 the complainant was informed that, under Article 15 of the insurance contract between the insurance company and the Global Fund, she was entitled to the payment of a lump sum and that under Article 16 she would receive a 50 per cent permanent disability benefit backdated to August 2010. She was advised that her disability was regarded as service-incurred and that there would be a re-evaluation before the end of 2011. By a letter of 15 July the complainant disputed the rate of her disability benefit, emphasising that she was completely unable to work. The insurance company replied on 19 August that, having regard to Article 20 of the insurance policy, the decision to grant her a 50 per cent permanent disability benefit was the "greatest possible concession on the part of the insurers". The benefit was paid on a quarterly basis as from 1 July 2011; the lump sum was also paid that month. In response to the complainant's request for medical arbitration, a report drawn up on 24 April 2014 recorded a professional incapacity rate of 100 per cent, a physical disability rate of 50 per cent and the need for a re-evaluation at a later date.

In the meantime, by a letter of 25 January 2012 the complainant, who considered that the Global Fund had "destroyed her health", asked it to redress all the injury which she had suffered by compensating her for the losses which, in her opinion, she had incurred in terms of salary (1,110,686 Swiss francs) and pension (789,610 francs), by defraying sums corresponding to medical bills which she had not submitted for reimbursement within the prescribed two-year time-limit (772.23 francs) and hospitalisation expenses (9,472.64 francs), by granting her 100,000 francs in compensation for moral injury and by awarding her costs in the amount of 30,000 francs. On 5 April 2012 the complainant put the Global Fund "on notice" to take a formal decision on her request for compensation by 20 April. The Global Fund merely asked that this deadline be deferred until 18 May.

On 16 July 2012 the complainant submitted a Request for Appeal to the Appeal Board in which she opted for written proceedings. She reiterated some of the claims which she had entered on 25 January, increased the amount of some of them – 150,000 francs for moral injury and 50,000 francs for costs – withdrew her claim for the defrayal of her hospitalisation expenses and presented other subsidiary claims. The Administration pleaded that the appeal was irreceivable as well as unfounded.

The Appeal Board delivered its report on 3 December 2013. It stated that it had found no evidence that the applicable rules had been violated and that the complainant had received all the payments to which she was entitled. However, the Board found that the complainant's case should have been dealt with more diligently and that she should therefore receive compensation on those grounds. It held that the medical expenses claim fell outside the scope of the appeal. It recommended that the Executive Director should pay the complainant compensation equal to two or three months' salary and should dismiss all her other claims. By a letter of 6 December 2013, which constitutes the impugned decision, the complainant was informed that the Executive Director had decided to grant her three months' salary.

In the meantime, in February 2013, the complainant had undergone a second medical assessment. In his report of 15 March 2013, the expert concluded that the complainant could no longer resume work at the Global Fund, but that a partial return to work in three months' time in a different professional context was conceivable. The payment of her 50 per cent disability benefit continued after 1 July 2013.

The complainant filed her complaint with the Tribunal on 20 March 2014. In her rejoinder, which she filed after seeing the medical arbitration report, she asks the Tribunal principally:

- To set aside the impugned decision insofar as it dismisses most of her claims;
- To find that she should have been granted a full disability benefit between 1 July 2011 and 30 June 2013 and to order the payment of 136,237.06 Swiss francs under this head, together with interest at 5 per cent as from 30 June 2012;
- To find that she should have received a lump sum corresponding to 100 per cent disability and to order the payment of 256,732.50 francs under this head, together with interest at 5 per cent as from 15 July 2011;
- To find that she should have been granted a 100 per cent disability benefit between July 2013 and June 2016 and to order the payment of the corresponding amount, plus interest for the period between July 2013 and September 2014;
- To find that she should receive a 50 per cent disability benefit as from July 2016 until she reaches retirement age and to order the payment of the corresponding amount;
- To reserve her rights for the future;
- To find that the Global Fund should compensate her by paying her the amount corresponding to total disability as long as her professional incapacity remains total and medically attested;
- To order the payment of 313,800 francs in respect of loss of pension, together with interest at 5 per cent as from 16 July 2012,

- To order the payment of 772.23 francs in respect of medical bills the reimbursement of which has been refused by the insurance company, together with interest at 5 per cent as from 16 July 2012,
- To order the payment of costs in the amount of 60,000 francs, together with interest at 5 per cent as from 16 July 2012, and of an additional 15,000 francs.

Subsidiarily, the complainant requests the convening of an oral hearing and presses her claims.

More subsidiarily, she asks the Tribunal to refer the case back to the Appeal Board in order that it may convene an oral hearing, to reserve her rights with respect to her other claims and to award her costs in the amount of 15,000 francs.

The Global Fund submits that the complaint is irreceivable. Subsidiarily, it contends that it is groundless. As it also deems the complaint to be vexatious, it asks the Tribunal to order the complainant to pay some of its costs.

## CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 6 December 2013 by which the Executive Director of the Global Fund followed the Appeal Board's recommendation to limit the compensation awarded to her, in addition to a disability benefit from the organisation's insurance provider, to a sum equivalent to three months' salary.

2. The complainant has requested oral proceedings. In view of the abundant and sufficiently clear submissions and evidence produced by the parties, the Tribunal considers that it is fully informed about the aspects of the case that are relevant to the outcome of the dispute and does not therefore deem it necessary to grant this request. Nor is it necessary, for the same reasons, to refer the case back to the Appeal Board for an oral hearing, as the complainant requests subsidiarily, or to order the production of the additional documentation which she suggests.

3. The Tribunal will not accept the defendant organisation’s plea that the complainant’s withdrawal of her first complaint effectively bars her from lodging this third complaint. First, as stated in Judgment 3506, also delivered this day, in which the Tribunal recorded the withdrawal of the first complaint and ruled on the second, the complainant was not thereby waiving her right of action to file any complaint raising the same issues as the first complaint, but merely withdrawing the proceedings, which does not have the same effect. Secondly, the mere fact that this complaint does not seek the same redress as the two previous ones, which sought the defrayal of medical expenses, also affords sufficient grounds for dismissing this objection.

4. In her most recent submissions to the Tribunal, the complainant no longer maintains her initial plea that by awarding her a 50 per cent disability benefit the insurance company incorrectly applied the scales laid down in Annex A to the Fund’s Accident and Invalidity Insurance Regulation and in Article 20 of the insurance contract concluded by the organisation.

Hence the Tribunal has no need to rule on the Fund’s objection that it is not competent to hear this case because it implicates the insurance company and not the organisation. It will be noted, however, that this objection would have called for the same response as that given to the analogous objection raised by the Fund in the aforementioned Judgment 3506.

5. The complainant contends that the rate of the benefit paid by the insurance company does not tally with her professional incapacity, which has been assessed by the various experts who have examined her as 100 per cent, and she submits that the Fund’s insurance policy does not provide staff with sufficient coverage. In her opinion, the organisation is therefore in breach of its duty to provide its staff with adequate social protection.

Contrary to the Fund’s contentions, under Article II, paragraph 5, of its Statute, the Tribunal is indeed competent to rule on this submission, because international civil servants are entitled to a

modicum of social protection and may therefore claim such protection on the basis of the staff regulations to which they are subject and their terms of appointment.

This submission is, however, without merit, since there is no principle of social protection requiring full compensation for loss of earnings. The risk coverage offered by an organisation's insurance scheme may well be only partial (see Judgment 2976, under 11) and rules limiting or setting a ceiling to the amount of the benefits paid are therefore perfectly lawful (see Judgment 1094, under 24). In the instant case, the complainant's loss of earnings cannot, in itself, be deemed to reflect an inadequate level of social protection offered by the Fund's insurance policy.

6. It follows that there is no basis on which the complainant can obtain compensation for the injury on which she relies in the form of a higher disability benefit, the lump-sum payment of such a benefit or the payment of sums calculated on the basis of the scales of these benefits. The claims submitted by the complainant in this respect therefore cannot be accepted in any case.

7. However, the complainant also submits that her state of health was caused by the Fund's wrongful conduct in its employment relationship with her. This line of argument, which rests on the service-incurred nature of her disability and thus has a different legal basis, is clearly more cogent.

8. The complainant, who after her recruitment by the Fund in February 2004 had been performing the duties of Executive Assistant to the Executive Director, considers that when a new Executive Director took office in April 2007 she was subjected to a brutal side-lining and to humiliating behaviour, both of which constituted harassment.

9. The Fund submits that the complainant may not rely on these incidents on the grounds that she did not, within the prescribed time limits, avail herself of the means of redress afforded by the

provisions of the Grievance and Dispute Resolution Procedure which were then in force.

10. The Tribunal finds that the mechanisms instituted by these provisions, which were extremely complex in that they comprised no less than four successive levels of appeal which also varied depending on the nature of the disputed decision, were unsuited to the instant case where the complainant, who reported directly to the Executive Director, wished to challenge decisions taken by him. In addition, it is plain from the evidence in the file that the complainant protested against her situation on 23 April 2007, in other words before the expiry of the three-month time limit laid down in section 2.4 of the aforementioned Procedure, to an administrator in the Human Resources Department, who might well have appeared to be the manager with whom she should raise a grievance at stage one of the process according to section 3.2.5 of that text. If the official to whom the dispute was referred did not have the authority to rule on the grievance submitted to her, pursuant to the case law of the Tribunal she ought to have forwarded it to the authority which was competent within the organisation to hear it, and no objection to the receivability of the complaint can be raised on this basis (see, for example, Judgments 1832, under 6, 2882, under 6, 3027, under 7, or 3424, under 8(b)). Moreover, the same duty to forward a document to the competent authority applied to the letter of the complainant's counsel of 31 August 2010 in which she submitted an appeal to the Fund resting on facts, some of which had materialised at a later date. The Fund has absolutely no grounds for asserting that it should have been addressed directly to the Executive Director.

11. With regard to the time limits for lodging appeals which are applicable in this case, it must also be noted that the aforementioned section 2.4 expressly provided for exceptions to the normal time limit when grievances were related to alleged harassment. As it is clear from the file that the Fund had undertaken, in letters from the Head of the Human Resources Department of 14 February and 19 December 2011, to suspend the time limits for appeals by the complainant, in the context of negotiations in the wake of the aforementioned letter of 31 August

2010, the organisation must be deemed to have implicitly granted her an extension of the time limits for an appeal, should she require it, on these grounds. Indeed, this undertaking would have been pointless if, as the Fund now submits, the time limits in question had already expired at the time of these negotiations.

12. The evidence in the file shows that, as soon as he took office in April 2007, the new Executive Director of the Fund decided to restructure the organisation's Secretariat, which included abolishing the post then held by the complainant, and to set up a new team of assistants of which the complainant would not be a member, as she was immediately informed.

13. It is by no means unusual that the executive head of an international organisation should decide, upon being appointed, to modify the structure and membership of her or his office and secretariat to suit her or his requirements. However, any such modification must respect the rights and dignity of the officials hitherto assigned to these units.

The Tribunal considers that in the present case the conditions in which the complainant was removed from her post of Executive Assistant in April 2007 did not meet this requirement. It is clear from the submissions in the file that, from the outset, the new Executive Director chose to bypass the complainant in daily working relations and to entrust some assignments directly to her assistants, which could only be hurtful to the complainant. Furthermore, the tenor of the message by which the Executive Director informed all the staff on 1 June 2007 of the restructuring of the Secretariat and, in particular, of the abolition of the complainant's post, showed no consideration for her whatsoever. It is equally obvious that the complainant was not immediately given another appropriate position and that it was not until January 2008, in other words more than eight months after being removed from her original post, that she was reassigned to duties matching her level of qualification. Lastly, it must be noted that the complainant's name had been temporarily deleted from the Fund's organisation chart, a situation which naturally greatly troubled her.

14. While it is unnecessary to determine whether or not these actions constituted harassment or to rule on the merits of the complainant's allegations regarding other matters the assessment of which might be open to debate, the Tribunal does not doubt that the harsh treatment meted out to the complainant at the time caused her to feel bitterness, frustration and humiliation. The Fund therefore acted wrongfully towards the complainant. Subject to the establishment of a causal link between that wrongful conduct and the complainant's disability, she is entitled to compensation from the Fund.

15. Notwithstanding the Fund's denials in this connection, the experts who were called upon to examine the complainant unequivocally established that the deterioration in her health was ascribable to the above-mentioned conduct of the organisation. The doctor appointed as medical arbitrator in the dispute between the complainant and the insurance company considered, for example, in his report of 24 April 2014, that "[t]he present state of the person undergoing examination, as shown by the calendar of events and the leitmotiv of her concerns, is a direct consequence of the conflicts which arose in her last job". The service-incurred nature of the complainant's disability was also recognised by the insurance company when it decided to grant her a disability benefit on 30 May 2011. The causal link between the organisation's wrongful conduct towards the complainant and the injury which she suffered is therefore established.

16. The Fund is therefore liable to provide compensation for this injury, without this obligation being restricted in any way by the terms of the organisation's insurance policy (see, in this connection, Judgment 2533, under 26).

17. It follows from the foregoing that the impugned decision by which the Executive Director of the Fund refused to grant this relief must be set aside insofar as it granted the complainant no more than a sum equivalent to three months' salary.

18. The complainant, who has held an appointment of continuing duration since 1 January 2009, would have received a full salary ever since the beginning of the period covered by her disability benefit had she not been completely unable to perform her duties owing to her state of health. Since she has been awarded a benefit at its present rate of 50 per cent until 30 April 2016, pending a further medical examination, the Fund will be ordered to pay her the equivalent of the salary and all other emoluments which she would normally have received if she had actually performed her duties within the organisation during the period between 1 July 2011 and 30 April 2016, less any sums received by her as disability benefit.

For the period prior to the delivery of this judgment, the compensation in question will take the form of a lump sum corresponding to all the additional remuneration due, together with interest at the rate of 5 per cent per annum as from the date on which the payment of each monthly remuneration fell due up until the date of payment.

For the period thereafter, this compensation will take the form of additional remuneration paid to the complainant every month until 30 April 2016.

The sums thus awarded shall be in addition to that, equivalent to three months' salary, already awarded to the complainant under the impugned decision.

It will likewise be incumbent upon the Fund to take all the necessary steps to ensure the restoration of the retirement pension rights which the complainant would have held had she received her normal remuneration for the whole period between 1 July 2011 and 30 April 2016.

This judgment will be rendered without prejudice to the rights which the complainant may claim depending on the development of her state of health and her legal status in the period after 30 April 2016.

19. The complainant requests the Tribunal to order the Fund to pay her the sum of 772.23 Swiss francs to cover medical bills which the insurance company refused to reimburse on the grounds that they

had been submitted after the expiry of the prescribed two-year time limit. The complainant, who contends that the delay in forwarding these invoices was due to her health problems, admonishes the organisation for failing to ask the insurance company for a waiver in her case, despite the fact that she had asked it to do so.

It is certainly regrettable that the Fund did not see fit to take that step. In this connection, the Tribunal refers to what will be said in the following consideration with regard to the breaches of the Fund's duty of care towards the complainant. It must, however, be found that since the success of such a request for a waiver is, by definition, by no means certain, the injury on which the complainant relies is only hypothetical and, as such, cannot give rise to compensation.

20. The Tribunal will not rule on the merits of the complainant's remaining pleas which, in the absence of any claim for moral damages as such, have no bearing on the outcome of the instant case. The Tribunal will, however, state that it shares the view of the Appeal Board, for the same reasons as those set out by the Board in its report, that in this case the Fund breached its duty of care towards the complainant in several respects.

21. As the complainant succeeds for the most part, she is entitled to costs in respect of the proceedings before the Tribunal as well as the internal appeal proceedings, which the Tribunal sets at a total of 7,000 Swiss francs.

22. The Fund has submitted the counterclaim that the complainant should be ordered to pay costs on the grounds that her complaint is vexatious. It follows from the foregoing that this claim must obviously be dismissed.

DECISION

For the above reasons,

1. The decision of the Executive Director of the Global Fund of 6 December 2013 is set aside insofar as it granted the complainant no more than a sum equivalent to three months' salary.
2. The Fund shall pay the complainant financial compensation for the injury resulting from her disability, plus interest thereon, and shall adopt the requisite measures to restore her pension rights as indicated under 18, above.
3. It shall also pay the complainant costs in the amount of 7,000 Swiss francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2015, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

*(Signed)*

CLAUDE ROUILLER SEYDOU BA PATRICK FRYDMAN

DRAŽEN PETROVIĆ