

I.

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

124th Session

Judgment No. 3866

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms G. I. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter “the Global Fund”) on 20 March 2014 and corrected on 29 July, the Global Fund’s reply of 17 November 2014, the complainant’s rejoinder of 11 March 2015 and the Global Fund’s surrejoinder of 24 June 2015;

Considering Article II, paragraph 5, 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 impugns the decision not to confirm her appointment at the end of her probationary period.

The complainant’s first contract with the Global Fund was a consultancy contract with the Office of the Inspector General (OIG) effective 1 November 2011. On 10 December 2012, further to a competitive recruitment process, she was appointed to the position of Investigator in OIG under a two-year appointment subject to a six-month probationary period. Following the arrival of Mr S. to OIG as a team leader in November 2012, the complainant was assigned to his team. She remained part of Mr S.’s team, reporting directly to him, until 15 February 2013, at which point she was assigned to the team of Mr M., who remained her line manager until her separation from the Fund on 8 July 2013.

In May and June 2013 the complainant had several interactions and e-mail exchanges with the Ombudsman and Ms O'D., the Head of the Human Resources Department (HRD) and OIG's Business Partner. On 25 May 2013 the Inspector General wrote to the complainant to inform her that he was considering whether to extend her employment at the end of her probationary period but that, prior to making a decision, he was seeking the views of the complainant's colleagues regarding her professional performance and behaviour. He requested her to provide her personal "self-assessment" by 29 May, which she did. Soon after, on 7 June 2013, at a meeting with her line manager and the Head of HRD, the complainant was informed that she had not successfully completed her probationary period and she was given 30 days' notice of termination of her appointment. She was handed a letter also dated 7 June 2013 informing her of the same, which she nevertheless refused to take.

By an e-mail of 18 June 2013 to the Head of HRD, the Staff Council requested her urgent action on the decision taken by the Inspector General to terminate the complainant's appointment at the end of her probationary period. Noting the absence of rules governing probation in the Global Fund's Employee Handbook as well as the principles spelled out in the Tribunal's case law on probation, the Staff Council asked the Head of HRD to review whether the decision not to confirm the complainant's appointment had been made pursuant to said principles or, otherwise, to confirm the complainant's appointment, unless there were valid grounds to extend her probation. On 19 June 2013 the Head of HRD confirmed the decision taken by the Inspector General not to confirm the complainant's appointment and advised that the complainant had the right to "use the usual dispute resolution procedures".

On 11 July 2013 the complainant sought clarification from the Head of HRD as to whether she should submit a Request for Resolution pursuant to the Grievance and Dispute Resolution provisions of the Employee Handbook, or whether she should proceed directly with the filing of an appeal to the Appeal Board. She also asked to be provided with the documentation that had served as the basis for the decision not to confirm her appointment. On that same day, the Head of HRD advised

that, as she was also the complainant's Business Partner "the next step for [the complainant] would be to request an appeal".

On 17 August 2013 the complainant filed an appeal with the Appeal Board against the decision to terminate her appointment for not having successfully completed the probationary period. She argued that said decision was in breach of the procedural requirements on probation set forth in the Tribunal's case law and contrary to the provisions of the Employee Handbook on performance management. The complainant also referred to "additional breaches" and argued that she had been subjected to unfair and unequal treatment, harassment, exclusion and retaliation. Further to a preliminary review of the case on 5 November 2013, the Appeal Board requested from the Head of HRD additional information and clarification as to the exceptional circumstances justifying her decision to advise the complainant to proceed directly with the filing of an appeal to the Appeal Board. Soon after, on 21 November 2013, the Appeal Board held a hearing. It submitted its report on 16 December 2013 concluding that the contested decision had been taken in compliance with the Employee Handbook and that the procedural requirements applicable at the time for staff members on probation had been respected. The Appeal Board did not find concrete evidence that any of the applicable rules had been violated and it therefore recommended that the appeal be dismissed.

By a letter dated 20 December 2013 and notified to the complainant on 22 January 2014, the Executive Director endorsed the Appeal Board's recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award her: (i) material damages equivalent to what she would have earned if her appointment had not been terminated, including all salaries, allowances, benefits, emoluments and entitlements, from the date of her separation until the expiry of her contract on 9 December 2014, plus interest from due dates; (ii) material damages equivalent to what she would have earned if her appointment had been extended for another two-year term, including all salaries, allowances, benefits, emoluments and entitlements, plus interest from due dates; (iii) damages in the amount of 360,000 Swiss francs for the wrongful termination

of her appointment, the harassment which she suffered and the Administration's failure to investigate her allegations of harassment; (iv) material damages for her loss of future earning capacity, since the Global Fund's decision has severely tarnished her reputation; (v) consequential damages flowing directly from the unlawful termination of her appointment (interest on student loans, medical costs, out of pocket healthcare costs for herself and her dependent family member, bar membership fees); (vi) damages for the cost of enrolment of her dependent family member in an equivalent health insurance plan; (vii) damages in the amount of 180,000 francs for the harm inflicted to her health and wellbeing. The complainant also claims moral and exemplary damages, any further relief that the Tribunal deems just and proper and costs. Lastly, she seeks an order that any adverse material be removed from her personnel file.

The Global Fund asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant joined the Global Fund's OIG in November 2011. Subsequently, she was granted a two-year contract, effective 10 December 2012, as a grade 4 inspector in the same unit subject to the successful completion of a six-month probationary period. On 7 June 2013, Ms O'D., the Head of HRD, informed the complainant that she had not successfully completed her probationary period and that having regard to the requisite thirty days' notice her last day of employment was 8 July 2013.

2. The complainant claims that the termination of her employment was unlawful on the grounds that the Global Fund violated the performance evaluation provisions in the Employee Handbook. Further, the termination was the culmination of a period of harassment/mobbing in violation of the Global Fund's harassment policy; was retaliation for her reporting of misconduct; amounted to unequal treatment; amounted to a disciplinary sanction; and was taken in violation of the principles governing a

probationary period stated in the Tribunal's case law. This latter ground will be dealt with first.

3. In summary, the Global Fund submits that it was within its right to terminate the complainant's appointment following an unsuccessful period of probation as her work was unsatisfactory and all applicable rules were followed. The Global Fund denies all the allegations of wrongdoing on its part.

4. The Global Fund points out that two rules in the Employee Handbook were applicable to the period of probation. Section 2 provides that the probationary period is generally for six months and Section 19 states:

“During the probationary period, the employee's employment may be terminated at any time and for any reason by giving written notice thereof at least 30 days ahead of the effective date of termination, or such shorter or longer period as may be specified in the employment contract.” (Emphasis added in the Global Fund's reply.)

The Global Fund stresses that in its dealings with the complainant it respected its own rules as established in the Employee Handbook. In particular, the Global Fund states that it gave the complainant the requisite notice; during a meeting on 18 June 2013 the complainant was given the reasons for the termination of her appointment and an opportunity to be heard at the meeting; and the provisions in the Employee Handbook were not breached as they did not apply to her.

5. The Global Fund's position is fundamentally flawed. In addition to observing the provisions in its Employee Handbook, the Global Fund ought to have also observed the obligations of an employer to an employee on probation articulated in the Tribunal's case law. As stated in Judgment 3440, consideration 2:

“A firm line of precedents of the Tribunal have established that a decision not to confirm an appointment at the end of a probationary period is subject to only limited review. Accordingly, the Tribunal will not interfere with that decision unless it was made without authority, or in breach of a rule of procedure, or was based on a mistake of fact or of law, or overlooked some essential fact, or amounted to an abuse of authority, or if mistaken

conclusions were drawn from the facts. In short, notwithstanding the nature of the decision, it may be set aside if the decision was made in breach of the complainant's contract, [the organization's] own regulations and rules or applicable general principles of law as enunciated by the Tribunal. The general principles are intended to ensure that an international organization acts in good faith and honours its duty of care towards probationers and to respect their dignity."

In Judgment 2788, consideration 1, the Tribunal identified the applicable principles as follows:

"[I]t is useful to reiterate certain principles governing probation that are of particular relevance to the present case. Its purpose is to provide an organisation with an opportunity to assess an individual's suitability for a position. In the course of making this assessment, an organisation must establish clear objectives against which performance will be assessed, provide the necessary guidance for the performance of the duties, identify in a timely fashion the unsatisfactory aspects of the performance so that remedial steps may be taken, and give a specific warning that the continued employment is in jeopardy (see Judgment 2529, under 15)."

6. Turning to an organization's obligation to establish clear objectives, the Global Fund contends that the complainant was well aware of her objectives and expected deliverables. In support of this assertion, the Global Fund notes that the complainant was well aware of the duties and deliverables required by the post at the start of her contract, as she had already been working within the Investigation Unit of OIG since November 2011. As well, she had signed the OIG Code of Ethics and Professional Conduct and the vacancy notice for the post set out the role and results expected, key responsibilities and accountabilities, technical skills and competencies and core competencies. The complainant herself acknowledged that she entered her performance objectives in the second half of April after consultation with her manager, at the same time as other employees of the same grade. The Global Fund explains that the fact that the identification of objectives process was not carried out at the time she entered into service was due to the fact that the Global Fund performance objectives setting process occurs on a set schedule for all staff. Moreover, contrary to the complainant's assertion, the Employee Handbook's rules on performance management and objectives setting do not apply to employees on probation.

7. The Global Fund acknowledges that objectives were not established at the start of the complainant's employment but points to other considerations in an attempt to overcome this requirement. It points, in particular, to the fact that the complainant was a consultant with the Global Fund immediately prior to her appointment. This consideration is irrelevant and ignores the fact that at the time of the appointment there was a material change in the complainant's status. It cannot be assumed that the duties, the responsibilities and reporting requirements would remain the same. The Global Fund's position also disregards the fact that not only did the complainant become an employee but an employee on probation. The documents and information the Global Fund identifies, including the vacancy notice, are general in nature and do not identify the complainant's objectives that served as a yardstick to measure performance. Additionally, the fact that the performance objectives setting only occurs for all staff members at a particular time does not absolve the Global Fund from its obligation to set the objectives at the start of the probationary period.

8. The Global Fund states that "[d]espite the absence of formal performance feedback procedure, the Complainant was repeatedly provided, both orally and through e-mails, with feedback that her performance was not satisfactory". As well, the complainant received a specific warning that her continued employment was in jeopardy during a 19 February 2013 telephone conversation with, Mr M., her new manager at the time. The Global Fund states that this is evidenced by the e-mails of 19 February 2013 filed by the complainant in the present complaint. Mr M. also provided a copy of the relevant page from his personal diary to the Appeal Board "showing that on 19 February 2013, he had a telephone conversation with the [complainant] to discuss her performance issues and to outline his expectations of her for the remaining part of the probationary period". The Global Fund adds that during "that telephone conversation, the unsatisfactory aspects of the complainant's performance were provided to her and she was told that her performance had to improve for her probation to be successful". As well, in addition to this specific warning, the complainant received additional warnings on at least two other occasions, on 6 February 2013 during a team

meeting and on 15 February 2013 when she was assigned to another investigation team.

9. According to the Appeal Board report, in its written response to the complainant's appeal the Global Fund stated that the complainant "received specific warning during a meeting with her second manager on 19 February 2013 that her employment was in jeopardy". The same report states that at the appeal hearing the complainant's manager "clarified (providing copy of the relevant page from his personal diary) that on 19 February 2013, he had a phone conversation with the [complainant] during which the expectations on her performance improvement were discussed". The Global Fund's written response to the appeal and the manager's statement at the appeal hearing are materially different. In the written response it states that the warning was given during a meeting with the complainant whereas at the appeal hearing the manager stated that it was given during a telephone call. As well, the written response states that at the meeting the complainant was specifically warned that her employment was in jeopardy however the extract from the diary does not refer to a warning.

10. The Appeal Board found that the complainant had "received a specific warning on 19 February 2013, during her phone conversation with her second manager. She was made aware of the risk of dismissal and the need for improvement." The Appeal Board found "no flaw in the procedure, as the Employee Handbook did not provide detailed guidance on probation". In reaching the conclusion that the complainant was specifically warned, it was incumbent on the Panel to reconcile the differences between the two accounts before making the finding. Additionally, in reaching its conclusion the Panel failed to have regard to the complainant's clear evidence that she was on mission on 19 February. The Appeal Board's finding that there was no flaw because there were no provisions in the Employee Handbook fails to have regard to the well-settled case law that a probationer must be given a timely warning that her or his employment is in jeopardy. In these circumstances, the Appeal Board's finding that a warning was given cannot stand. It must also be observed that a careful review of the record does not reveal any

19 February e-mail by the complainant acknowledging or confirming receipt of a warning that her employment was in jeopardy. The other two warnings the complainant was allegedly given are not documented. Moreover, a warning that would be given at a meeting at which other colleagues were present would constitute a serious breach of the obligation to treat an employee with dignity and respect.

11. In this same vein, it is convenient to add that on 25 May 2013 the Inspector General wrote to the complainant advising her that the extension of her appointment beyond the probation period was under consideration. In addition to asking the complainant to submit her personal assessment, he stated that he was “seeking the views of [her] colleagues on [her] professional performance and behaviour (both the ‘what’ and ‘how’ aspects of [her] work)”. It is for the organization to objectively assess the professional performance and behaviour of its employee. Seeking the views of colleagues undermines the objectivity of the assessment. It also shows a lack of respect for the concerned employee and it is humiliating for her or him to know that colleagues are being asked to assess her or his performance and behaviour.

12. The Global Fund’s disregard and breach of the well-established principles regarding probation requires that the impugned decision be set aside. In the circumstances, the complainant is entitled to moral damages as well as material damages for the loss of the opportunity to have her appointment confirmed in the total amount of 40,000 euros and costs of 1,000 euros. The Tribunal will also order that all adverse material be removed from her personnel file in the Global Fund.

13. Although the complainant claims that she both orally and in writing reported harassment and mobbing, a careful review of the record does not show a written report of harassment that would necessitate a prompt and thorough investigation of the allegations on the part of the Global Fund. While the record reflects that the Global Fund failed to treat the complainant with dignity and respect, it cannot be said that any of the actions complained of amount to retaliation, unequal treatment or the imposition of a disciplinary sanction.

DECISION

For the above reasons,

1. The 20 December 2013 decision is set aside.
2. The Global Fund shall remove all adverse material from the complainant's personnel file.
3. The Global Fund shall pay the complainant damages in the total amount of 40,000 euros.
4. The Global Fund shall pay the complainant costs in the amount of 1,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 19 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ