Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

J. (No. 2)
v.
Global Fund to Fight AIDS, Tuberculosis and Malaria

127th Session **Judgment No. 4074**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr G. J. J. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter "the Global Fund") on 18 October 2016 and corrected on 30 November 2016, the Global Fund's reply of 14 March 2017, the complainant's rejoinder of 18 April, corrected on 3 May, the Global Fund's surrejoinder of 7 August, the complainant's further submissions of 8 December 2017 and the Global Fund's final comments thereon of 5 March 2018;

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 the decision not to review or amend the separation agreement offered to him on 10 February 2012 and to terminate his appointment as of 7 May 2012 without the appropriate financial package.

The complainant joined the Global Fund on 8 August 2011 as ad interim Director of the Corporate Services Cluster. He signed two contracts with identical terms for this position, the last contract covering the period 8 August 2011 to 30 April 2013. By a memorandum dated

11 August 2011 the Deputy Executive Director informed him that in accordance with the terms of his contract for the period 8 August 2011 to 30 April 2013, he was given notice of termination of employment as of 7 May 2012. The parties differ as to when the complainant actually saw this memorandum.

By a letter of 6 February 2012 the complainant was informed that his contract of employment was terminated with three months' written notice and that he was placed on special leave with pay for the remainder of his contract. He was also offered a separation agreement, which was amended, following discussions, on 10 February. On 11 February the complainant stated that he would not sign the agreement until the Global Fund had explained to him why he was "released" from duty. The Director of Administration, Internal Communications and Human Resources (HR) replied on 3 March that the reason for his release was that, as formally announced to staff on 24 February 2012, the post of Director of the Corporate Services Cluster had been abolished.

On 3 May 2012 the complainant stated that he had never been given the rationale behind the decision to terminate his contract and claimed that he was entitled to compensation that had been offered to staff made redundant after the restructuring of the Global Fund. On 16 May 2012 he filed a formal grievance against the decision to terminate his contract. Having received no reply, he appealed before the Appeal Board on 17 July 2012 challenging the same decision and the implied decision not to review or amend the separation agreement offered to him. This appeal led to Judgment 3425, delivered in public on 11 February 2015, on the complainant's first complaint, in which the Tribunal sent the case back to the Global Fund in order for the internal appeal procedures to be properly followed.

As settlement discussions were unsuccessful, by a letter of 26 June 2015 the Chief of Staff provided a formal response to the complainant's "pending grievances" and informed him that, although the Global Fund had not breached any contractual obligations and all payments owed to him had been made, it recognized several shortcomings and offered the complainant compensation in the amount of 25,000 Swiss francs for the stress and hardship suffered in connection with the termination of his

contract and 1,500 francs for costs. The complainant rejected the offer on 8 July 2015 and appealed the "decision not to review or amend the separation proposal" of 10 February 2012 and the termination of his contract as of 7 May 2012 without the appropriate financial package.

In its report of 12 July 2016 the Appeal Board recommended dismissing the appeal as unfounded, but suggested that the Executive Director renew the offer of 26 June 2015. By a letter of 29 July 2016 the Executive Director informed the complainant that he endorsed the Appeal Board's recommendation and that he was prepared to renew the offer made on 26 June 2015. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order his reinstatement to a suitable post. Alternatively, he requests payment "of [his] contract in full to the current date together with all appropriate entitlements estimated at circa 300,000 [Swiss francs] per annum". He claims reimbursement of unpaid allowances due under his contract, moral damages under several heads, a proper reference letter reflecting his work at the Global Fund, as well as costs.

The Global Fund submits that some of the complainant's claims are irreceivable for failure to exhaust internal remedies as they were not made in his original appeal and that his request for compensation for the failure to deal with his original grievances is irreceivable under the principle of *res judicata*. It argues that the complaint is unfounded and that the complainant should not be awarded costs.

In his further submissions the complainant objects to documents produced by the Global Fund in its surrejoinder, including a sworn affidavit by Mr S., a staff member of the Global Fund, stating that he had hand-delivered the memorandum of 11 August 2011 to the complainant in September 2011.

CONSIDERATIONS

1. The complainant is a former employee of the Global Fund. He separated from the Fund in 2012. On 18 October 2016 he filed a complaint with the Tribunal and both he and the Global Fund have filed their respective pleas as contemplated by the Tribunal's Rules together with supplementary submissions.

2. The Global Fund, in its pleas, raises an issue about the scope of the complaint. This issue needs to be addressed at the outset as it potentially will influence the matters the Tribunal must consider and deal with in this judgment. The issue arises this way. The Tribunal delivered a judgment in public on 11 February 2015 concerning the rejection by the Global Fund's Appeal Board of an internal appeal lodged by the complainant (see Judgment 3425). The Tribunal made several orders. The first was that the rejection of the complainant's internal appeal be quashed. The second was that the complaint be sent back to the Global Fund so that the internal appeals procedures could be followed, "as stated in consideration 10". Several conclusions or findings are found in Judgment 3425 that have a bearing on the scope of the complaint in these proceedings. The first, found in consideration 8, was that the grievance identified by the complainant in a document intended to commence the internal appeal process (a Request for Appeal dated 17 July 2012) had two elements. The first was that he was contesting the "Global Fund's tacit decision not to renew [*recte* review] or amend the separation proposal offered to [him] on 10 February 2012". The second element was the "termination of [his] contract as of 7 May 2012".

3. Thus the scope of the grievance remitted to the Global Fund for the purpose of following the Grievance and Dispute Resolution Procedure was as stated in the preceding consideration. The Tribunal observed in consideration 9 of Judgment 3425 that that Procedure and the relevant provisions in the then applicable Human Resources Regulations contemplated a four-stage process. The first step, which involved raising issues with the line manager, was a step to be taken as a prelude to an appeal and the right of appeal (by way of formal appeal to the Appeal Board) was "conditioned by the exhaustion of the preceding steps". The legal effect of those provisions and the conclusions of the Tribunal as well as the Tribunal's orders was that the grievance then partly examined had to be addressed by following the four-stage process (to the extent it was applicable to the complainant) and then, and only then, could the complainant lodge a formal appeal. The subject matter of that appeal would be the initial grievance as considered in the four-stage process. It would not satisfy the purpose of the prescribed procedure if

the subject matter of the grievance considered in the four-stage process could be materially or even radically expanded when the formal appeal process was initiated. To treat the procedure as capable of operating this way would enable matters not considered in the four-stage process to be raised in the formal appeal. The entire scheme was intended to avoid this happening.

4. After the matter was remitted to the Global Fund, the complainant's grievance was ultimately considered by the Appeal Board within the framework of a formal appeal. It issued a report on 12 July 2016. One matter it addressed was the scope of the appeal. It said, correctly, it would not "accept elements in the appeal that were added after the initial appeal was lodged or entertain requests for additional remedies". It identified, again correctly, the subject matter of the appeal and the matters it would concentrate on as the two elements referred to above in consideration 2. The result of this analysis is that the internal appeal concerned those two elements only and, accordingly, the complaint filed with this Tribunal concerns only the adjudication by the internal appeals body of those two elements. Accordingly, the Tribunal will address only those elements in the remainder of this judgment.

5. It is convenient to deal first with what is potentially a significant factual issue, namely whether the complainant ever received a memorandum dated 11 August 2011. It is common ground between the parties that this date did not reflect when the document was created. It was created later that month or the following month. The memorandum was purportedly issued to the complainant by the Deputy Executive Director and copied to the HR Director. The subject of the memorandum was described as "Notice of termination". The body of the memorandum said:

> "Further to your contract of employment for the period 08th August 2011 to 30 April 2013, I am hereby informing you that, in accordance with the provisions of the afore-mentioned contract, you are being given notice of termination of your employment as of 07th May 2012.
>
> Your last date of employment shall thus be 07th May 2012."

In terms, this document was terminating employment on 7 May 2012 even though the contract of employment was due to expire on 30 April 2013.

6. In discussing whether the complainant, as a matter of fact, received this memorandum, it is desirable to detail some of the broader factual context. On the complainant's account of events concerning the signing of employment contracts at the time he commenced his employment, he was shown three contracts but signed only two, the second and third. The second contract he signed on 12 August 2011 (the second contract). It identified a start date of 8 August 2011 and a date at which the contract "will automatically come to an end", namely 8 August 2012. The third contract he signed on or after 30 August 2011 (the third contract). It identified the same start date and the end date, on the same terms, as 30 April 2013. In evidence is an e-mail of 30 August 2011 from Mr S., People Services Manager, Corporate Services Cluster, to another person to "amend and re-issue" another contract with the end date of 30 April 2013. It can be inferred the third contract with this end date was prepared sometime on or after 30 August 2011. This sequence of events is not contested by the Global Fund.

7. On 6 February 2012 the complainant was informed orally and then in writing that his employment was to conclude on 7 May 2012 and, in the meantime, he was to be placed on special leave with pay. The complainant subsequently met with the HR Director, which resulted in a letter from her to the complainant dated 6 February 2012 though actually written on 10 February 2012 (the 10 February letter). The letter commenced: "Pursuant to the terms of your appointment as set out in your contract of employment for the period of 8 August 2011 to 30 April 2013, and the subsequent notice period ending the contract of employment as of 7 May 2012 (letter dated 11 August 2011) [...]". While this commentary refers to a "letter", it is tolerably clear that the HR Director was, from her perspective, referring to the memorandum of that date. There was a further reference later in the 10 February letter to the 11 August 2011 memorandum: "For purposes of honouring the terms of the contract of employment of 8 August 2011 and subsequent

letter dated 11 August 2011 terminating the contract of employment as of 7 May 2012 [...].”

8. The complainant responded to the 10 February letter in an e-mail the following day, 11 February 2012. There is no suggestion whatsoever in the complainant’s e-mail that he did not understand this reference to the 11 August 2011 memorandum (actually described as a letter) nor that he did not understand the alleged effect of the document. Both were of considerable significance in the events then unfolding. Had he not known of the 11 August 2011 memorandum’s terms (and thus its effect), almost certainly he would have challenged, probably vigorously, these aspects of the 10 February letter in his immediate response. The 11 August 2011 memorandum’s significance was obvious. But he did not do so. His failure to challenge what was said in the 10 February letter about the 11 August 2011 memorandum provides a firm evidentiary foundation for the Tribunal to infer he was aware of its terms and aware of its effect.

9. Indeed the Global Fund makes the point in its reply in these proceedings that it was not until the complainant submitted his rejoinder in the internal appeal on 16 March 2016 that he was denying any prior awareness of the 11 August 2011 memorandum. The complainant’s rejoinder in these proceedings contains an answer to this point: “Further misleading by the Defendant. I never denied awareness of the concept of the document, I was pointing out that it was the first time that I had actually seen a copy of it.” What is meant by the second sentence is by no means clear. There are a number of other references in the pleas of both the complainant and the Global Fund of evidence or statements supportive of their respective positions that the complainant never saw the 11 August 2011 memorandum, on the one hand, and on the other that he had. Ultimately the Tribunal is satisfied the complainant had seen a copy of the 11 August 2011 memorandum about the time it was created.

10. Centrally supportive of that conclusion are the matters discussed in considerations 7 and 8 above, as well as a sworn affidavit of a staff member of the Global Fund, Mr S., filed by the Global Fund

as part of its surrejoinder deposing to the fact that he gave a copy of the 11 August 2011 memorandum to the complainant in September 2011, as best he could recall, and placed the original in the complainant's employee file. The complainant was given an opportunity to respond to the surrejoinder. In relation to the affidavit, the complainant disavows accusing Mr S. of lying but suggests he has a poor recollection of the facts as they occurred. The complainant then proceeds to point out what he believes are inconsistencies or anomalies in the 11 August 2011 memorandum, but those points really have no bearing on whether, as a matter of fact, he was given a copy of it. The complainant then restates his position that he never received or saw this document until it was produced in the internal appeal. He goes on to question the legal relevance of the document. As indicated earlier, the Tribunal does not accept this denial and finds that the complainant was given a copy of the 11 August 2011 memorandum that constituted a notice of termination.

11. The Tribunal acknowledges that there are a number of curiosities and anomalies in the behaviour of the parties, and in particular the behaviour of the Global Fund, in signing an employment contract of a specified duration, the second contract, almost immediately thereafter signing a further employment contract of a longer duration, the third contract, and then curtailing the length of the operation of that contract with the 11 August 2011 memorandum. From all the material, the Tribunal is satisfied that, as a matter of fact, the position for which the complainant applied and to which he was appointed was, at the outset, intended to be short-term. That is to say, it was for nine months only. The complainant does not dispute this. However, the formulation and reformulation of the contracts involving longer periods were at the behest of the complainant, who believed their acceptance by the Global Fund was altering the nature of his employment. The complainant was then occupying a very senior position in the Global Fund and there was an obvious willingness to accommodate him. The complainant says, and this is not disputed, the provision allowing for termination of both the second and third contract on three months' notice was his idea. However, what is clear from the 11 August 2011 memorandum was that the Global Fund, through its officers, was not resiling from its original

intention that the complainant’s employment be short-term notwithstanding the contracts expressed to be of longer duration (but subject to the right to terminate on notice).

12. If, as the Tribunal accepts, the notice of termination constituted by the 11 August 2011 memorandum was given and received, it was legally effective to terminate the contract on 7 May 2012. As discussed, one of the terms of the third contract was that it could be terminated by either party giving three months’ notice. Properly construed, that would mean a minimum of three months’ notice and this was achieved by the 11 August 2011 memorandum. This leads to a consideration of the complainant’s approach to the events in February 2012.

13. In his pleas, the complainant argues that his employment under the contract (the third contract) was to be until 30 April 2013 and that this had a bearing on the amounts he should have been paid and to which he remains entitled. This is so having regard to what he effectively characterises as the premature termination of his employment on 6 February 2012 effective 7 May 2012. However what this analysis does not accommodate is that the third contract, which the complainant says is the entire contract, itself allowed, in terms and as already discussed, for its termination “by either party giving three months’ written notice”. So quite apart from the effect of the 11 August 2011 memorandum, it was open to the Global Fund to terminate the contract effective 7 May 2012 in February 2012.

14. However, even though the termination effective 7 May 2012 was lawful, the conduct of the Global Fund in February 2012 did not respect the dignity of the complainant. So much appears to be accepted by the Global Fund by apologising to the complainant in a letter of 26 June 2015 for at least some of what occurred in or about February 2012 and offering him compensation. This offer was rejected.

15. Without descending into detail having regard to the position of the Global Fund referred to in the preceding consideration, the advancing of the practical end date of the complainant’s employment

from May 2012 to February 2012 was peremptory, without adequate explanation and was conducted in a way including a request that the complainant immediately leave the premises, that did not respect the complainant's dignity. While he alleges this effect, the complainant has not proved to the satisfaction of the Tribunal any damage to his career or reputation. The complainant is entitled to moral damages assessed in the sum of 30,000 Swiss francs and which reflect that he was a senior executive brought in to assist the organisation during change and had, it clearly appears, performed at the high level expected of him. The level of damages should reflect that this was the context in which he was very poorly treated at the time he was summarily excluded from the organisation and following.

16. The complainant also contends that he should have been paid certain allowances in specified amounts when employed by the Global Fund and seeks orders for their payment. However his entitlement to those payments does not, as discussed earlier, arise for consideration in these proceedings.

17. One further matter should be mentioned. The complainant seeks moral damages for the delay in the internal consideration of his grievance. The Global Fund argues this claim is irreceivable. Routinely and necessarily such a claim can only first be made in the Tribunal. The claim is receivable. The Global Fund contends the internal appeal process took 11 months, which was reasonable. The complainant draws attention to the fact that there was a period of nearly 18 months between the public delivery of the Tribunal's judgment and the final decision of the Executive Director. Even taking that longer period, significant periods of time can be attributed to the conduct of the complainant or his counsel, particularly the time taken to respond to a Global Fund proposal concerning informal discussions to resolve the matter in the first half of 2015. The internal appeal took approximately 11 months. This is a lengthy period but, in all the circumstances including the factual and legal complexity of the proceedings, it was not unreasonable. The claim for moral damages for excessive delay is rejected.

18. The complainant has represented himself in these proceedings but is entitled to an order for costs in the sum of 700 Swiss francs.

DECISION

For the above reasons,

1. The Global Fund shall pay the complainant 30,000 Swiss francs in moral damages.
2. The Global Fund shall pay the complainant 700 Swiss francs in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 26 October 2018, Mr Giuseppe Barbagallo, 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 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ