

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

T.

v.

**Global Fund to Fight AIDS, Tuberculosis
and Malaria**

137th Session

Judgment No. 4739

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. T. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (“the Global Fund”) on 15 October 2020 and the Global Fund’s reply of 1 February 2021;

Considering the order of 12 February 2021, by which the President of the Tribunal ordered the Global Fund to provide the Tribunal with the investigation report on the complainant’s formal complaint of harassment, and the document produced by the Global Fund on 15 March 2021 pursuant to the President’s order;

Considering the complainant’s rejoinder of 27 April 2021 and the Global Fund’s surrejoinder of 3 August 2021;

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 contests the Global Fund’s decision to close his harassment complaint and not to provide him with a copy of the investigation report.

On 15 March 2019, the complainant, a Senior Advisor in the Enterprise Risk Management Department at the time, filed a formal complaint of harassment, in which he alleged having experienced a pattern of chronic harassment and bullying from the Chief Risk Officer in retaliation for feedback he had provided about him to the then Chief of Staff. He requested (i) that the Chief Risk Officer's pattern of abuse be investigated and stopped; and (ii) that he be transferred to a team where he could make good use of his knowledge, skills, and experience.

On 1 May 2019, the complainant was temporarily assigned to the position of Information Technology Governance Officer, under a new reporting line, fully maintaining his previous terms and conditions of employment. This assignment was subsequently extended a number of times. Ultimately, effective 1 October 2021, the complainant was permanently assigned to the position of Fund Portfolio Manager in the Grant Management Division Pool.

Meanwhile, the investigation into the complainant's harassment complaint was entrusted to an external investigation firm which, in its report submitted on 26 June 2019, concluded that the complainant's various allegations could not be substantiated.

By a letter of 30 July 2019, the Head of the Human Resources Department (HRD), informed the complainant that his allegations had been investigated and he advised him that the matter "ha[d] now been concluded". In July and August 2019, the complainant sought further clarification regarding the outcome of the proceedings and the follow-up to his requests. The Administration responded that it could not share the outcome of the investigation as per the applicable rules, but it also confirmed that it had taken action to address the findings of the investigation.

On 21 September 2019, the complainant again sought further information regarding the investigation and its outcome, requested a copy of the investigation report, and inquired whether he should challenge the 30 July 2019 decision by way of an appeal to the Appeal Board or a request for resolution. On 23 September 2019, the Head of HRD replied that the complainant had been informed of the completion of the disciplinary proceedings and, therefore, no further information would

be provided. The Head of HRD advised him to file a request for resolution.

Following this advice, the complainant filed, on 8 October 2019, a request for resolution regarding the Administration's decision to close his harassment complaint. Ultimately, however, after having been advised by the Head of HRD to raise his grievance directly with the Appeal Board, he filed, on 20 January 2020, an appeal against the 30 July 2019 decision to dismiss his harassment complaint.

The Appeal Board held two pre-hearings and one hearing and, in its report, submitted to the Executive Director on 3 July 2020, it concluded that:

- the decision not to provide the complainant with a copy of the investigation report was regular, as there was no provision in the Employee Handbook entitling the complainant to review the said report, and its confidentiality aimed at protecting the interests of all staff members involved in the process;
- the complainant's due process rights were preserved, as HRD was sufficiently clear as to why no finding of misconduct had been made, and the Appeal Board had the opportunity to review additional documents submitted by the complainant and to interview additional witnesses proposed by him;
- notwithstanding that the 30 July 2019 decision had not allowed the complainant to fully understand the reasons underlying it and to make a proper assessment of the facts, the complainant had the opportunity to rely on the Appeal Board's proceedings to clarify the matter, to further establish the facts, and to better understand the contested decision;
- the Global Fund had fulfilled the duty of care owed to the complainant by taking adequate measures in response to his complaint and by transferring him to a position outside the Enterprise Risk Management Department;
- the harassment complaint was taken seriously, the investigation was expeditious and thorough, and the decision to "conclude the matter" was regular; however, all of this did not mean that there

was no problem in the Enterprise Risk Management Department, as several staff members in that department had complained about the work climate therein and had experienced issues similar to those alleged by the complainant.

Based on these conclusions, the Appeal Board recommended that the Executive Director dismiss the appeal. The Appeal Board also noted that managerial action had already been taken regarding the Chief Risk Officer's management style and called upon the Executive Secretary to continue to closely monitor the situation in the Enterprise Risk Management Department.

By a letter of 20 July 2020, the Executive Director informed the complainant that he had decided to endorse the Appeal Board's recommendation and to reject his appeal as unfounded. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, which confirms the 30 July 2019 decision to dismiss his harassment complaint. He also asks the Tribunal to recognise that the investigation was inadequate, to order the Global Fund to arrange for a new investigation or, otherwise, to find that he was a victim of harassment and retaliation, and to order it to take adequate measures to mitigate the consequences thereof and to prevent further harassment. He claims (i) compensation for any material damages he suffered, and may suffer, as a consequence of the harassment; (ii) 50,000 euros in moral damages for the harassment, retaliation and physical pain he has suffered and continues to suffer, and the flawed investigation process; (iii) reimbursement of the total costs he incurred in bringing this case to the Tribunal.

The Global Fund asks the Tribunal to reject the complaint as partly irreceivable and entirely unfounded.

CONSIDERATIONS

1. The complainant impugns the Executive Director's decision of 20 July 2020 endorsing the Appeal Board's recommendation to reject his appeal against the decision of 30 July 2019, made by the Head of the Human Resources Department (HRD), to close his harassment complaint.

2. The complainant alleges, inter alia, that the Global Fund's decision to "close the matter", namely his harassment complaint, is unsubstantiated. He argues that he was not provided with the investigation report or any information about the findings of the investigation. He also argues that the Global Fund violated his right to due process by not giving him the opportunity to comment on and challenge the evidence collected in the course of the investigation, such as witness statements.

3. One of the complainant's claims at the time he filed the complaint was that the Global Fund be ordered to produce the investigation report. In an email dated 3 November 2020, under cover of which the Registrar of the Tribunal forwarded the complaint to the Global Fund, the Registrar noted the complainant's request for the disclosure of the investigation report and requested the Global Fund to specifically address this issue in its reply. In its reply, dated 1 February 2021, the Global Fund refused to disclose the investigation report on the grounds that, pursuant to its rules, it was under no obligation to provide the complainant with a copy of the investigation report and the complainant, as a reporter of harassment, was not entitled to receive a copy thereof.

4. Under Article 11 of the Tribunal's Rules, the President of the Tribunal decided to order the disclosure of the investigation report on the grounds that it was necessary for the full understanding of the case and that the Global Fund had not presented sufficient reasons for its refusal to disclose it. The President's order for disclosure was communicated to the Global Fund in a letter dated 12 February 2021. On 15 March 2021, the Global Fund provided the Registry with a redacted

copy of the investigation report and some of its annexes. On 31 March 2021, the Registrar forwarded these documents to the complainant.

5. With regard to the complainant's claim that the Tribunal should order the Global Fund to take adequate measures to mitigate the consequences of his alleged harassment and to prevent further harassment, the Global Fund contends that this claim is irreceivable. The argument is correct. An order of such measures, including to permanently assign the complainant to another team, is beyond the Tribunal's competence (see Judgment 4096, consideration 12). The Tribunal nonetheless notes that, by a letter of 4 June 2021, the complainant was informed of his permanent assignment, with effect from 1 October 2021, to the position of Fund Portfolio Manager in the Grant Management Division Pool, which he accepted. Consequently, the complainant's claim is also moot, as there is no longer a live controversy (see Judgment 4060, consideration 3).

6. On the merits, the Global Fund submits that the complainant was adequately informed of the reasons underlying the decision of 30 July 2019 to "close the matter". Relying on Judgment 4081, consideration 5, the Global Fund argues that the reasons for a decision did not have to be stated in the decision itself as long as they were provided to the complainant in the course of the internal appeal process. It submits that the complainant was provided with relevant information enabling him to identify the reasons for the decision, to build his case accordingly, and to submit any additional evidence he considered relevant. The Global Fund maintains that there was no obligation on its part to disclose the investigation report, as there is no provision in the Employee Handbook that entitled the complainant to review the investigation report.

7. The Tribunal notes that, contrary to the Global Fund's submissions, the complainant was only provided with a draft summary of his interview conducted during the investigation and he was not given access to the witness statements, or the summaries thereof, in order to respond to them. The Appeal Board's report merely contained

a brief and general remark that “there [was] no reason to question the quality of the investigator’s work or to suspect it as incomplete” but it failed to consider whether the findings of fact made in the investigation resulted from a careful examination and assessment of the evidence gathered by the investigators. In the impugned decision, the Executive Director simply stated that “[f]or the reasons set out in the report of the Appeal [Board], in particular paragraphs 58 to 76 [...] I would like to inform you that I have endorsed the recommendation of the Appeal [Board] and I have therefore decided to dismiss your appeal as unfounded”.

8. Annex XI of the Employee Handbook – Prohibition of Harassment and Bullying, provides in Section 4.3 “Formal Complaints”, among other things, that: “The formal complaint shall trigger the application of Annex IX of the Employee Handbook - Disciplinary Procedure, with respect to the conduct of Global Fund employees”. Annex IX contains a number of provisions regarding the due process rights of the person accused of harassment, including the right to be given an opportunity to comment on the draft report of investigation, but it is silent on the due process rights of the person reporting the harassment. This may explain why the Global Fund had insisted that the investigation report not be disclosed to the complainant until the Tribunal had issued a disclosure order.

9. In this case, it is important to recognise that, notwithstanding that under the applicable rules the formal complaint triggers a disciplinary procedure, the actual report of the investigator assessed whether the complainant had been the victim of harassment and did so on the basis that, to quote the report:

“The objective of the investigation was to conduct a factual assessment to determine whether there is sufficient information to substantiate the allegations made based on the available evidence. This assessment will enable the Head of [HRD] [...] to determine whether grounds exist for the initiation of a disciplinary procedure pursuant to the relevant provisions of the Employee Handbook and the Code of conduct.”

Thus, the report contemplated a decision in the future about whether the disciplinary procedure would be initiated. In this respect, the report addressed only the question of whether the harassment had taken place.

10. According to the well-settled case law of the Tribunal, recently recalled in Judgment 4547, consideration 3, “a staff member who lodges a harassment complaint is plainly a party to the procedure conducted to ascertain whether that complaint is well founded, even though she or he would not be a party to any subsequent disciplinary proceedings taken against the perpetrator in the event that the harassment was recognised. The staff member concerned is therefore entitled to know whether it has been recognised that acts of harassment have been committed against her or him and, if so, to be informed how the organisation intends to compensate her or him for the material and/or moral injury suffered”.

As regards the complainant’s argument that his due process rights were violated, the Tribunal recalls its case law, recently confirmed in Judgment 4313, consideration 7, that “a staff member is entitled to be apprised of all material evidence that is likely to have a bearing on the outcome of her or his claims (see Judgment 2767, under 7(a)) and that failure to disclose that evidence constitutes a serious breach of the requirements of due process (see Judgment 3071, under 37)”, as well as that “in the context of an investigation into allegations of harassment, a complainant must have the opportunity to see the statements gathered in order to challenge or rectify them, if necessary by furnishing evidence (see Judgments 3065, under 8, 3617, under 12, 4108, under 4, 4109, under 4, 4110, under 4, and 4111, under 4)”. Also, in Judgment 4217, consideration 4, the Tribunal held that “by refusing to provide the complainant with the [investigation] report [...] during the internal appeals procedure it nevertheless unlawfully deprived her of the possibility of usefully challenging the findings of the investigation” and “the fact that the complainant was ultimately able to obtain a copy of the report during the proceedings before the Tribunal does not remedy the flaw tainting the internal appeal process”.

In Judgment 4547, consideration 10, the Tribunal held that:

“It is well settled in the Tribunal’s case law that an international organisation is bound to grant a request from the staff member concerned for a copy of the report delivered by the investigative body at the end of an investigation into a harassment complaint, even if that means the report must be redacted in order to maintain the confidentiality of some aspects of the investigation, in particular the testimony gathered during that investigation (see, in particular, Judgments 3347, considerations 19 to 21, and 3831, consideration 17, and also Judgments 3995, consideration 5, and 4217, consideration 4).”

The legal vacuum in the Global Fund’s rules does not absolve the Administration from the obligation to disclose the investigation report to a person reporting harassment.

11. In its report of 3 July 2020, the Appeal Board noted that the complainant had “repeatedly made the request for a copy of the investigation report, invoking adversarial due process as a basis for his request”. However, the Appeal Board observed that “there [was] no provision in the Employee Handbook that entitle[d] the complainant to review the investigation report [and] that the confidentiality of the investigation report aim[ed] to protect the interests of all staff members involved in the process”. It concluded that “the decision not to give [a] copy of the investigation report to [the complainant] was regular”. By so doing, the Appeal Board erred in law. For the same reasons, the Executive Director’s decision to dismiss the appeal, based on the Appeal Board’s report, was also unlawful.

12. The Global Fund’s refusal to provide the complainant with a copy of the investigation report, even with reasonable redactions to respect the confidential nature of some aspects of the investigation, during the internal appeal process, seriously breached the complainant’s right to due process. It unlawfully deprived him of the possibility of effectively challenging the findings of the investigation in the internal appeal process. It follows that the impugned decision, dated 20 July 2020, was tainted by a fundamental flaw and must therefore be set aside, without there being any need to examine the complainant’s other pleas concerning the unlawfulness of this decision.

13. In the present case, the Tribunal does not have sufficient information that would enable it to reach an informed decision on the complainant's harassment complaint. The investigation report before the Tribunal is so heavily redacted that much of the documentation relevant to the allegation of harassment, namely the witness statements, is omitted. The Tribunal is therefore not able to determine with certainty whether the alleged harassment actually took place or not, even were it appropriate for it to do so. In these circumstances, the Tribunal considers it appropriate to refer the case back to the Global Fund so that (unless the case is settled in the meantime): (i) the Appeal Board shall carry out a new internal appeal process, in line with due process requirements (including by giving the complainant the opportunity to comment on the investigation report and the evidence gathered, redacted as appropriate to safeguard the interests of third parties, in order to challenge or rectify them); and (ii) the Executive Director shall take a new decision on the Appeal Board's recommendation.

Since the complainant was denied due process in the internal appeal and was unlawfully deprived of the possibility of effectively challenging the findings of the investigation in the internal appeal process, he will be awarded moral damages in the amount of 15,000 euros.

14. As the complainant has not provided sufficient information in support of his request for material damages, this claim for relief is rejected. As regards the complainant's claim for moral damages for the injury he suffered as a consequence of the alleged harassment and for the Global Fund's refusal to take adequate action to follow up on his harassment complaint, the Tribunal notes two things. First, no award of moral damages can be made in the absence of a conclusive finding as to whether the alleged harassment actually took place or not. Second, the Global Fund actually did take action, and did so soon after the harassment complaint was submitted, by removing the complainant from the Chief Risk Officer's supervision and by assigning him to a position under a different reporting line. As regards the complainant's claim for moral damages for the allegedly long process following the submission of his harassment complaint, which had a direct impact on his health, the case law states, for example in Judgment 4425,

consideration 10, that the complainant bears the burden of proof and must provide evidence of the alleged unlawful act, of the injury suffered, and of the causal link between the unlawful act and the injury. However, the complainant has failed to discharge his burden of proof in this respect and, accordingly, his claim for moral damages for the injury he allegedly suffered to his health because of the long process must be rejected.

15. The complainant is entitled to an order for costs which are assessed in the amount of 10,000 euros.

DECISION

For the above reasons,

1. The Executive Director's decision of 20 July 2020 is set aside.
2. The matter is referred back to the Global Fund in order for the Appeal Board to carry out a new internal appeal process, in accordance with due process requirements, and for the Executive Director to take a new final decision on the Appeal Board's recommendation, as per consideration 13 above.
3. The Global Fund shall pay the complainant moral damages in the amount of 15,000 euros for the breach of due process in the internal appeal, as per consideration 13 above.
4. It shall also pay the complainant costs in the amount of 10,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 24 October 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER