

116th Session

Judgment No. 3247

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms C. C. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter “the Global Fund”) on 27 September 2011 and corrected on 25 November 2011, the Global Fund’s reply of 28 February 2012, corrected on 14 March, the complainant’s rejoinder of 14 May, corrected on 6 June, and the Global Fund’s surrejoinder of 20 August 2012;

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 and the pleadings may be summed up as follows:

A. The complainant, a French national born in 1959, joined the United Nations Office for Project Services (UNOPS) in 1998. She was seconded to the World Health Organization (WHO) in June 2006 and assigned to work in the Global Fund in June 2006 under a two-year fixed-term contract. At the time, staff working in the Global Fund Secretariat were formally employees of WHO. The memorandum of

inter-organization exchange governing her secondment from UNOPS to WHO and the Global Fund provided that the exchange was for a period of two years, with the complainant returning to UNOPS by 18 June 2008. This date coincided with the end of the complainant's fixed-term contract with UNOPS. At the time, the Global Fund was treated, for administrative purposes, as part of WHO. By a memorandum of 12 June 2008 addressed to UNOPS's Director of Organization Effectiveness and Human Resources, the Global Fund's Human Resources Manager offered that she be transferred from UNOPS to WHO, with effect from 19 June 2008. On 24 June the complainant accepted a two-year extension of her appointment with WHO, but as Fund Portfolio Manager assigned to the Global Fund.

By a letter of 27 August 2008 the complainant was informed that the Administrative Services Agreement between the Global Fund and WHO was coming to an end on 31 December 2008 and that her employment status would change as a result of the Global Fund becoming an autonomous organisation.

By a letter of 24 October 2008 the Global Fund's Executive Director sent the complainant an offer of employment, according to which she would be formally separated from WHO and transferred to the Global Fund, effective 1 January 2009.

By an e-mail of 26 November 2008 the complainant refused the offer of employment of 24 October, on the ground that she believed she would be disadvantaged in terms of her pension entitlements.

Following discussions an agreement was reached between WHO, UNOPS and the Global Fund, whereby the complainant would be transferred back to UNOPS and then loaned to the Global Fund, so as to maintain her pension entitlements in the United Nations Joint Staff Pension Fund (UNJSPF). By a memorandum of 18 December 2008 UNOPS's Director of Organization Effectiveness and Human Resources asked for the Global Fund's approval of this proposal. The memorandum specified that the complainant would be hired by the Global Fund on a Reimbursable Loan Agreement from UNOPS, with effect from 1 January 2009, in order to allow her to "keep her tie with the UN and continue her contribution to the Pension Fund until she

reaches the age of 55". This proposal was accepted by the Global Fund in a memorandum of 13 January 2009, which was also sent to the complainant.

The complainant accepted an offer of appointment for the position of Fund Portfolio Manager with UNOPS on 19 January 2009. In February 2009 she signed the letter of appointment for that position, which was dated 23 January 2009. This letter stipulated the following under "Special Conditions": "This appointment is limited to your assignment under Reimbursable Loan to the Global Fund." However, there were issues with her performance and, on 13 May 2009, she agreed to be placed on a Performance Improvement Plan.

In November 2009 the complainant was reassigned to the Country Coordinating Mechanisms (CCM) Team for an initial trial period of six months, commencing on 1 December 2009.

By a letter of 23 July 2010 she was informed that, given the complexities of her new position, her supervisor, the Manager of the CCM Team, had decided to extend the initial period of assessment until 31 December 2010. For the duration of that period of assessment, she would remain on a reimbursable loan with UNOPS.

In August 2010, in response to a recommendation for a salary increase submitted earlier that year to the Independent Review Panel, the complainant was informed that issues of salary increase should be raised directly with her employer, UNOPS.

By an e-mail of 17 December 2010 the complainant's supervisor informed her that there had not been a significant improvement in her performance corresponding to the level of expertise and professional capacities commensurate with her role as Senior CCM Funding Officer. Therefore, he had recommended to the Executive Director that her "contract with the Global Fund be terminated".

By a letter of 23 December 2010 the complainant was notified of the decision to "terminate" her contract, with effect from 31 March 2011. For the duration of the three-month notice period, from 1 January to 31 March 2011, she would be placed on special leave with full pay. Around the time she was informed of this decision, the

complainant explored the possibility of returning to UNOPS, but she was told that she did not have a right to return and that she would have to apply for a new vacancy.

She was subsequently considered for a UNOPS position, but an appointment did not materialise.

In a letter of 31 July 2011 the UNOPS Human Resources Director informed the complainant that UNOPS was under no obligation to extend her contract beyond 31 March 2011, the expiry date of the Reimbursable Loan Agreement with the Global Fund. He nevertheless proposed to her a one-year contract extension with UNOPS, retroactively from 1 April 2011, on the understanding that she would be placed on special leave without pay for the duration of the extension.

Meanwhile, on 2 February 2011, the complainant requested that the decision to terminate her contract “be suspended”. She was told that, should she wish to lodge an appeal against the decision of termination, she would need to refer the matter to the Global Fund’s Appeal Board, in accordance with the applicable rules.

The complainant appealed and, in its report of 1 June 2011, the Appeal Board recommended that the Executive Director uphold his decision to terminate the complainant’s employment with the Global Fund. Nevertheless, it also recommended that she be awarded 20,000 Swiss francs “for the additional time period and satisfaction she would have been afforded had her Performance Improvement Plan process been conducted in line with good practice” and that she be provided with a completed performance appraisal for 2010.

By a decision of 5 June 2011 the Executive Director of the Global Fund agreed with the Appeal Board’s recommendations. That is the impugned decision.

B. The complainant contends that the decision impugned is tainted with multiple flaws. She argues that the Global Fund breached several provisions of its Employee Handbook by extending her probation period until 31 December 2010, without justification or notice and without conducting any initial performance evaluation. In her view,

any disagreements over her performance should have led Human Resources to formulate proposals aimed at finding alternative positions for her. In any event, her contract and the terms and conditions of her loan to the Global Fund should not have been affected by the result of the probation period.

The complainant asserts that no objectives were set at the beginning of her temporary assignment period. She points out that her objectives were set only in May 2010 and that she did not receive her mid-term review until September 2010. This is highly irregular and constitutes a procedural flaw which, in her view, justifies the setting aside of the impugned decision. The complainant denies that her work was unsatisfactory and contends that the whole process was conducted in breach of her due process rights. She argues that the Performance Improvement Plan was put in place to give an impression of procedural regularity, but by then the decision to terminate her contract had already been taken by her supervisor.

The complainant takes issue with the Appeal Board's refusal to address the issues of her irregular transfer from UNOPS to WHO and the violation of the Reimbursable Loan Agreement with UNOPS, and maintains that it was only after the letter of 23 December 2010 that she was informed of her legal status with UNOPS. Therefore, her claims in this regard should be deemed receivable. In her view, the Global Fund committed an error of law and breached her acquired rights by failing to provide her with the exact terms of the inter-agency transfer.

Lastly, the complainant argues that the recommendation to dismiss her was motivated by the supervisor's resentment at her salary being reviewed. The decision impugned is tainted, therefore, with abuse of authority.

The complainant asks the Tribunal to set aside the impugned decision, to confirm her appointment as of 31 December 2010 and to reintegrate her in a suitable position at the Global Fund under the same conditions as those which applied during her appointment with UNOPS. She also asks that her inter-agency transfer and the Reimbursable Loan Agreement be cancelled or altered and that her

right to return to the position she held with UNOPS be guaranteed. She seeks material and moral damages, as well as costs.

C. In its reply the Global Fund argues that the complaint is irreceivable, as the complainant is not an official of the organisation within the meaning of Article II of the Tribunal's Statute. Indeed, although the complainant worked in the Global Fund Secretariat between 2006 and 2011, she was never an employee of the Global Fund. It explains that in December 2010 the decision was made to terminate the Reimbursable Loan Agreement with UNOPS because of the complainant's unsatisfactory performance. The defendant denies that it terminated the complainant's contract of employment, as her contract was with UNOPS and the Global Fund was not in a position to terminate this third party arrangement. In its view, the principal thrust of her complaint is that she should have had a right to return to a paid position within UNOPS upon termination of the Reimbursable Loan Agreement. However, both as a matter of jurisdiction and on the merits, any claims she might have can only be against UNOPS. Consequently, as a former employee of UNOPS, the proper forum for her complaint is the UN Dispute Tribunal.

On the merits, the Global Fund denies that the complainant's temporary assignment to the CCM Team amounted to a probation period as defined in its Employee Handbook. It explains that the complainant was assigned to the role of Senior CCM Funding Officer on a temporary basis in order to ensure that her profile was appropriate for the post. Given that her earlier performance had been poor, this was both appropriate and reasonable. It points out that the complainant agreed to take on this new assignment on a temporary basis and that she was properly advised and supported by her supervisor throughout its duration. The Global Fund maintains that the decision to terminate the complainant's Reimbursable Loan Agreement was based solely on her unsatisfactory performance.

The Global Fund denies the complainant's allegation that her performance review and her Performance Improvement Plan were not conducted in a fair and objective manner. It points out that the

complainant signed the Performance Improvement Plan in October 2010 without reservation and that the Appeal Board found no violation of the applicable rules and procedures in this regard. The Global Fund asserts that it fulfilled in good faith its obligation to inform the complainant about the unsatisfactory aspects of her performance and that it provided her with the opportunity to improve it in accordance with the Tribunal's case law.

As regards the complainant's alleged irregular inter-agency transfer from UNOPS to WHO and the alleged breach of the Reimbursable Loan Agreement with UNOPS, the Global Fund contends that both allegations are time-barred and, therefore, irreceivable. It denies that the complainant was unaware of the terms and conditions of her inter-agency transfer and underlines that, in any event, it does not have the power to grant a right of return to UNOPS. The Global Fund simply agreed to a transfer arrangement with UNOPS on the terms and conditions proposed by the latter. Moreover, this arrangement was put forward at the complainant's request and to accommodate her desire to preserve her UN pension rights. The Global Fund points out that the complainant signed a letter of appointment with UNOPS dated 23 January 2009, which expressly excludes any expectancy of renewal or conversion to any other type of appointment with UNOPS.

The Global Fund strongly denies the complainant's allegations of misuse of authority or harassment by her supervisor and considers that they are wholly unsubstantiated. Lastly, it denies that it was slow in providing her with her performance evaluations. It explains that, as some performance reports had not been formally completed and signed off by the Administration and, given that the last mid-term report showed underperformance, it was agreed with the complainant that the defendant would provide her with a statement of performance instead, which it did.

D. In her rejoinder the complainant presses her pleas. In her view, it is against the rules of good faith for the Global Fund to raise an objection to the receivability of her complaint at this late stage of the

procedure, on the strength of facts which were known to it at the time of the internal appeal. She argues that, as the Global Fund failed to raise this objection before the Appeal Board it must now be rejected as irreceivable. She adds that the objection, if accepted, would deprive her of any means of judicial recourse. She maintains that the full terms of the Reimbursable Loan Agreement were never communicated to her, and adds that she was misled by the defendant, which made her believe that the standard principles of inter-agency transfers applied, including the right to return to UNOPS.

E. In its surrejoinder the Global Fund maintains its position in full. It points out that the complainant has admitted her knowledge of the terms of the Reimbursable Loan Agreement. The defendant underlines that she could not have ignored that her status as an employee of the UN system would be maintained through the agreement between UNOPS and the Global Fund, since this was precisely what she had requested. It submits that her arguments on receivability are misguided and adds that she was given a full opportunity to respond.

CONSIDERATIONS

1. The complainant filed her complaint on 27 September 2011. The defendant organisation is the Global Fund. The complaint is fundamentally concerned with decisions made on 23 December 2010 and on 5 June 2011 that the complainant viewed as decisions to terminate her employment. The complaint also concerns events leading up to those decisions. However the Global Fund challenged the jurisdiction of this Tribunal and it is a threshold issue that should be addressed at the outset. The legal issue, precisely put, is whether, on the basis that the Global Fund is an organisation that has recognised the jurisdiction of the Tribunal for the purposes of Article II, paragraph 5, of the Tribunal's Statute, the complainant was an employee of the Global Fund and thus an official of that organisation for the purposes of Article II, paragraph 5, of the Statute. However, in order to address this issue, it is necessary to discuss the

complainant's employment history and also the status of the Global Fund.

2. The fundamental facts are not in dispute. The Global Fund identifies its status in its reply. It is a Swiss foundation with a unique international legal personality existing by virtue of, amongst other things, the Headquarters Agreement between the Global Fund and Switzerland. Any greater precision is unnecessary if, as discussed shortly, some other body or entity was the complainant's employer. However it should be noted, at this point, that the Global Fund is an organisation that has recognised the jurisdiction of the Tribunal.

3. In her brief, the complainant recounts her employment history. Her account commenced in 1998 when she started working for UNOPS. In June 2006 she joined the Global Fund on secondment from UNOPS. The Global Fund annexed to its reply an undated memorandum of inter-organisation exchange governing this secondment. It noted that the exchange would be for a period of two years commencing on 19 June 2006 with the complainant returning to UNOPS by 18 June 2008. The memorandum contemplated the extension of the assignment with the consent of "all three parties" which plainly included the complainant. It was also agreed in the memorandum to provide the complainant with a right to return to UNOPS subject to certain limitations and qualifications. Her salary was to be paid by UNOPS and her leave entitlements were to be determined by reference to UNOPS regulations and rules. But more generally her exchange was to be governed by the regulations and rules of the Global Fund.

4. According to the complainant, in June 2008 she was purportedly transferred at the Global Fund's request through an inter-agency transfer from UNOPS to the Global Fund. This, she said, was done without her approval. This occurred at a time when both the complainant's contract with UNOPS and her secondment were to conclude (on 18 June 2008).

5. There is correspondence that indicates that, at this time, the complainant was an employee of WHO. The complainant's explanation for this was that she earlier had been the subject of an inter-agency transfer between UNOPS and WHO. On the other hand the Global Fund annexed to its reply a document dated 24 June 2008 signed by the complainant extending her contract (suggested by the document to be with WHO) until 18 June 2010. This was said by the Global Fund in its reply to be a formal transfer of the complainant to WHO as an employee.

6. Whatever may have been the legal effect of events in June 2008 and earlier, the complainant's employment status crystallised in late 2008. On 24 October 2008 the complainant was sent a letter from the Executive Director of the Global Fund. The letter said it enclosed (the enclosure is not in the material in the complainant's brief) an offer of employment:

“[...] with the Global Fund that sets out in detail the conditions that will govern your employment with effect from 1 January 2009. The offer involves your formal separation from WHO and transfer to the Global Fund effective from 1 January 2009, under the terms contained in the attached transfer agreement and offer of employment.”

The letter went on to note that the offer had to be accepted by 28 November 2008. It also noted that if it was not accepted then “your HR Business Partner will contact you with a view to discussing a mutually agreed separation from WHO”. The letter noted further that, if there was no mutually agreed separation agreement concluded by 10 December 2008, separation would occur on 31 December 2008 consistent with a notice of termination that had been sent on 27 August 2008.

7. Of some importance is the fact that the complainant resisted this arrangement (of taking up employment with the Global Fund) because she believed she would be disadvantaged. This ultimately led to correspondence between Ms A., the Director of Organization Effectiveness and Human Resources of UNOPS and the Head of Human Resources of the Global Fund proposing an arrangement

whereby, effective 1 January 2009, the complainant would be transferred back to UNOPS and that she would “be hired by The Global Fund on a Reimbursable Loan Agreement from UNOPS”. This arrangement was being proposed, according to the memorandum from Ms A., to “allow [the complainant] to keep her tie with the UN and continue her contribution to the Pension Fund”. After some discussion about the costs of the arrangement, the proposal was accepted. This was evidenced in a memorandum of 13 January 2009 from Ms A. to the Global Fund’s Director of Human Resources and Administration. The agreement involved the Global Fund paying UNOPS for the actual costs associated with providing the complainant’s services (one can infer this included salary) plus 13 per cent for after service health insurance. In her brief, the complainant emphasised that she had not accepted the “contract offer” from the Global Fund and that there had been an agreement with UNOPS for a reimbursable loan for those services until she reached 55. Consistent with this arrangement, UNOPS paid the complainant’s salary (but reimbursed by the Global Fund) and made payments into the UNJSPF on her behalf.

8. In her rejoinder the complainant annexed a document dated 8 January 2009 she signed on, it appears, 19 January 2009. In terms, it was an offer of appointment by UNOPS. Following acceptance of this offer, the complainant signed a letter of appointment dated 23 January 2009 and did so, it appears, on 9 February 2009. It contained a special condition (referred to later) that concludes with the sentence: “This appointment is limited to your assignment under Reimbursable Loan to the Global Fund.”

9. In the second half of 2010, issues arose about the provision of a performance review of the complainant’s work in a position she had assumed at the end of November 2009 though effectively for a probationary period of six months. Later, this period was extended. In June 2010, a recommendation was made for the complainant’s salary to be moved to the P-5 level in the UN salary scale. According to the complainant, this led to resentment on the part of her supervisor who had been transferred from WHO to the Global Fund. Ultimately, this

may have led (on the complainant's account of her supervisor's motives) to the recommendation from her supervisor to terminate her "contract with the Global Fund". There was such a recommendation and the reason given by the complainant's supervisor was that there had not been a significant improvement in the complainant's performance commensurate with the role she was then performing. The termination was to be effective 31 December 2010 with a period from 1 January to 31 March 2011 being considered as a special leave with full pay. Shortly before this time (in September 2010) the complainant fell ill. The termination did occur, effective 31 March 2011.

10. Either before or immediately after the termination, the complainant made enquiries about returning to UNOPS. Indeed the complainant said in some of her correspondence quoted in her brief that she had been applying for positions in UNOPS since December 2010. The enquiries about returning to UNOPS were answered in an e-mail of 7 January 2011 from Mr V., a human resources specialist working with UNOPS. She was told the loan arrangement with the Global Fund did not envisage any return right to UNOPS and that the complainant would have to apply and compete for any vacancy she may consider suitable. The e-mail also made reference to the separation package she would be provided if, it can be inferred, the complainant was unsuccessful in securing a position within UNOPS.

11. In March 2011, the complainant was offered a UNOP's position in New York. However this appointment did not proceed because of the complainant's inability to produce a performance evaluation coupled with a decision not to recruit for the position at that time.

12. The Human Resources Director of UNOPS wrote to the complainant on 31 July 2011 setting out its position on this question of the complainant's right to return and also setting out the terms of an offer made to the complainant. The first point made was that the complainant had signed a letter of appointment (the most recent at the

time the letter was written in July 2011) in February 2009. That letter of appointment had stipulated, as a special condition:

“Pursuant to staff rule 104(b)(ii), this fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment with UNOPS. Furthermore, staff members specifically recruited with UNOPS have no entitlement for consideration for posts outside that Project. This appointment is limited to your assignment under Reimbursable Loan to the Global Fund.”

13. The letter went on to note that the Reimbursable Loan Agreement with the Global Fund had expired on 31 March 2011 and that UNOPS was under no obligation to extend the complainant’s contract beyond that date. The letter also reminded the complainant that this arrangement had been made by UNOPS at her request. The letter also discussed events in June 2008 involving the complainant’s transfer from UNOPS to the Global Fund.

14. The offer made in the letter was that the complainant would be employed on a contract retroactively from 1 April 2011 through 31 March 2012 and that the claimant would be on special leave without pay from 1 April 2011. The benefit to the complainant was identified in the letter as keeping her on a UN fixed-term appointment for the entire period and, should she succeed in obtaining a suitable position either with UNOPS or any other UN agency, her full-time employment would be resumed and she would be able to validate her UNJSPF contributions for the period of unpaid leave, if desired. It is not clear how the complainant responded though it can be inferred this offer was rejected.

15. In its reply the Global Fund made three essential points. The first was that the complainant had never been employed by the Global Fund and was not an official of the Global Fund for the purposes of Article II of the Tribunal’s Statute. The second was that in these circumstances the Tribunal did not have jurisdiction to hear the complaint. The third was that positions adopted by the Global Fund in internal appeal processes preceding the complaint to this Tribunal, cannot affect or alter the operation of the Tribunal’s Statute which

both confers and limits jurisdiction. The Global Fund referred to Judgments 2503, 3049, 2657, 1509 and 2867.

16. In her rejoinder the complainant argued that the Global Fund had not acted in good faith. It had told the complainant that she should submit her grievances to the Global Fund Appeal Board, the Board had assumed jurisdiction and at no point in the internal appeals process did the Global Fund raise any issue about the receivability of her complaint before the Board. In these circumstances, it was not open to the Global Fund to raise, for the first time, the receivability of the complaint to the Tribunal. Moreover by raising the point now, the complainant will be deprived of her fundamental rights to have her grievance heard. Also, the complainant pointed to aspects of her work consistent with her being a Global Fund employee (such as having been provided with a Global Fund Employee Handbook in October 2008) and consistent with having been bound by the Global Fund staff rules and regulations. Reference was made to Judgments 1419, 2837, 522, 2255, 2700, 2919 and 2768.

17. The Global Fund maintained its pleas in its surrejoinder.

18. While there is, on the material before the Tribunal, some opaqueness about the precise arrangements before the complainant's employment status was crystallised in mid-2008, there can be no doubt that, by January 2009, the complainant was employed by UNOPS and that this was a result of the position she adopted in mid-2008 whereby she believed she would be adversely affected by accepting an offer of employment with the Global Fund. This culminated in her accepting an offer of appointment from UNOPS and being given a letter of appointment by UNOPS both in January 2009. The appointment was, in terms, "limited to your assignment under Reimbursable Loan to the Global Fund". The complainant was, at the time of the impugned decisions and the events about which she complains leading up to that decision, an official of UNOPS albeit on loan to the Global Fund.

19. The starting point in considering the Global Fund's argument about receivability is to observe that the jurisdiction of the Tribunal is derived from its Statute. It is also limited by that Statute. As the Tribunal observed in Judgment 1509, consideration 14, the Statute determines the Tribunal's competence and decisions of internal appeals boards and the positions adopted by the most senior staff of organisations (and, the Tribunal adds, organisations themselves) cannot give the Tribunal jurisdiction which its Statute does not.

20. In a case such as the present, jurisdiction is limited and defined by organisations submitting to the Tribunal's jurisdiction and the complainant being an official (or former official) of an organisation that has so submitted (see Judgments 2503, consideration 4, and 3049, consideration 4). The complainant was not an official of the Global Fund at any relevant time. She was an official of UNOPS, which has not submitted to the Tribunal's jurisdiction. Accordingly, the Tribunal has no jurisdiction to determine the complainant's complaint save for determining whether it has jurisdiction. The complaint is therefore not receivable.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Michael F. Moore
Hugh A. Rawlins
Catherine Comtet