119th Session **Judgment No. 3425**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. J. J. against the Global Fund to Fight AIDS, Tuberculosis and Malaria on 20 October 2012 and corrected on 3 and 21 December 2012, the Global Fund's reply of 24 April 2013, the complainant's rejoinder of 23 July and the Fund's surrejoinder of 7 November 2013;

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 joined the Global Fund on 8 August 2011 as *ad interim* Director of the Corporate Services Cluster. Various versions of the offer of employment were exchanged between the parties before an agreement was reached on the type of contract and its duration, but the contract that was ultimately signed was a contract for a defined duration which specified that it would automatically come to an end on 30 April 2013, following which the Global Fund "may decide" to extend it for a further period. The contract also

stipulated that it could be terminated at any time by either party giving three months' written notice.

By a memorandum of 11 August 2011 the Deputy Executive Director, who was the complainant's line manager, gave him notice that his employment would terminate as of 7 May 2012. However, on 6 February 2012 the Deputy Executive Director wrote to the complainant offering a mutually agreed separation whereby he would be placed on special leave with pay with immediate effect until separation on 7 May 2012 and would receive relocation entitlements for travel, removal and repatriation as applicable at the time of separation. Following a meeting between the Director of Administration, Internal Communications and Human Resources Unit (HR), the terms of the proposed agreement were modified on 10 February and sent back to him for signature. On 11 February the complainant wrote to the Director indicating that he had no intention of signing an agreement until the Fund had explained to him why he was released from his duties with immediate effect. The Director replied on 3 March that the reason for his release was that the new General Manager, who had taken up his duties on 6 February and whose mandate was to restructure the Fund by the end of 2012 had decided to work directly with her (the HR Director) and with the Legal Counsel – who had formerly reported directly to the complainant – because he needed their advice to proceed with the restructuring.

The complainant wrote to the HR Director several times in March with respect to the reimbursement of his relocation expenses but received no reply. He wrote again on 3 May, asking her to deal with his earlier requests urgently so that he could proceed with his relocation. He also asked the Director to explain why he had not been offered the same benefits as had been offered to staff made redundant after the restructuring of the Fund. He added that, since he had not yet received any formal confirmation of the reasons for his termination, he assumed that his position had been abolished, either before or immediately after his departure, and that he was therefore entitled to compensation. He wrote to the Director again on 16 May requesting that urgent attention be paid to his earlier requests and indicating that his e-mail should be considered as a "formal grievance" if that was what was required in

order for his requests to be addressed. She replied that day that she was out of the office but would revert to him.

Having received no reply on the substance of his e-mail, on 7 July the complainant wrote to the Office of the Appeal Board (AB) asking for advice as to the procedure to be followed to contest the termination of his contract. On 9 July the Office replied by e-mail that requests for appeal from staff members "c[a]me directly to the Office of the AB and not through the HR department", and that ordinarily a staff member would go through the four stages of the internal grievance and dispute resolution procedure before filing an appeal with the AB. Relevant provisions were attached to the e-mail.

On 17 July the complainant filed an appeal with the AB challenging the decision to terminate his contract and not to offer him the financial package that was offered to colleagues whose contracts were terminated at the same period. He also challenged the implied decision not to review or amend the separation agreement offered to him on 10 February 2012. By an e-mail of 31 August 2012 he was informed that the Chair of the AB had reviewed his submissions and had noted that he had not gone through the formal grievance and dispute resolution procedure, which was a prerequisite for filing an appeal. He was therefore advised to formally raise a grievance with the General Manager. That is the impugned decision.

B. The complainant contends that his complaint is receivable as he tried all by all possible means to be heard by the Global Fund. He contacted the General Manager and the HR Director but received no reply. He argues that his request of 16 May 2012 to the Director asking her to consider his e-mail as an appeal clearly marked the end of any internal dispute resolution mechanism. Having received no answer, he referred the matter to the AB on 17 July. In his view, the AB made an error of law in not hearing his appeal.

On the merits, he states that he was initially engaged on an *ad interim* position, but as the position was highly critical to successfully address the problems faced by the Fund, he was given a defined duration contract. He acknowledges that during the initial discussions

concerning his appointment he was offered a 9-month contract (up to 7 May 2012), but emphasises that the offer was then modified twice extending the duration of his contract up to April 2013. He contends that the Fund did not abide by its rules when it terminated his contract. Firstly, his post was abolished after the decision to terminate his contract was taken, which means that his appointment was terminated for arbitrary reasons. Secondly, he never signed the proposal of 6 February 2012 for a mutually agreed separation, which indicated that he would be placed on special leave with pay. Consequently, he never agreed to be placed on special leave with pay. Thirdly, the Fund failed to apply to him the rules on redundancy; in particular, it did not do its utmost to find him another position. The Fund showed bad faith in failing to reply to his requests concerning the calculation of the indemnities due to him upon separation.

The complainant asserts that he was summoned to leave the Fund immediately on 6 February 2012 without any warning, causing him personal and professional prejudice. Moreover, according to the Tribunal's case law, this amounts to harassment.

He alleges unequal treatment in that he was not invited to participate in selection processes for other vacant positions and was not offered a "separation package", unlike other employees whose contracts were terminated following the restructuring of the Fund. He also alleges that the Fund has refused to provide him with a reference letter, despite his requests, which has seriously impaired his ability to find another job.

He asks the Tribunal to set aside the decision to terminate his contract, to order that he be reinstated in a suitable position or awarded a financial compensation with "an agreed separation package to the minima of that offered to the other employees" whose contracts were terminated during that period, to order that he be reimbursed his medical insurance fees for the period of his contract, and to order the Fund to issue him with a reference letter. He also claims the payment of the salary and entitlements he would have received had the Fund let his contract expire on the date stipulated therein, as well as moral damages and costs.

C. In its reply the Global Fund contends that the impugned decision of 31 August 2012 does not constitute a final decision, and that the complainant has failed to exhaust internal means of redress insofar as he contests the decision to terminate his appointment. He deliberately ignored the applicable internal dispute resolution procedure and did not file a formal grievance with his line manager, i.e. the Deputy Executive Director; instead he proceeded directly to the AB. When he was informed by the AB that he had to exhaust all stages of the dispute resolution procedure before filing an appeal, he filed a complaint directly with the Tribunal. The Fund adds that, even if the appeal he submitted to the AB on 17 July 2012 were deemed to be validly filed, it would have to be considered time-barred, because he was notified in August 2011 that his contract would be terminated on 7 May 2012, and the letter of 6 February 2012 did not constitute a new decision triggering new time limits. The Fund further submits that some of the complainant's claims are irreceivable because they were not stated on the complaint form as initially filed, but were added at the correction stage.

On the merits, the Fund asserts that the complainant was informed from the outset that the position of Cluster Director was an *ad interim* position and that it was offered to him for a limited period of time. It was only to suit him that the initial offer of employment was modified as to its duration, but the contract he signed still included a termination clause with three months' notice.

According to the Fund, the complainant's contract was validly terminated. First, his post was abolished for legitimate reasons at a time when his contract had already been terminated. No one was hired to replace him. The Fund stresses in this connection that the executive head of an organisation has discretionary authority to undertake restructuring. Second, it sent him the written notice of termination in August 2011, thus fulfilling its contractual obligations. As to the fact that he was placed on special leave with pay, it explains that the General Manager decided to do so because he wanted to work directly with the HR Director and the Legal Counsel, whose advice was needed to proceed with the restructuring. The Fund adds that all other

senior managers whose positions were abolished received the same treatment. Third, the rules on redundancy, which require the issuance of a notice of redundancy and efforts to reassign redundant staff, did not apply to him because his contract was terminated in August 2011, long before his position had become redundant. Thus, he was not in a situation comparable to that of other employees whose contracts were terminated prematurely after their posts had become redundant. Moreover, his contract was of less than four years' duration, and he received better separation conditions than he would have been entitled to under the applicable provisions had his contract been terminated in the context of the restructuring.

According to the Fund, the complainant was given sufficient time properly to organise and announce his departure. All staff members were aware that he had been appointed for a limited period of time, and other employees were likewise placed on special leave with pay in the context of the restructuring. The complainant should consequently not be entitled to any damages.

The Fund decided not to issue him with a letter of reference because of his "continuously adversarial attitude" following his separation. It nevertheless indicates that a work certificate is available upon request.

It asks the Tribunal to order the complainant to pay all costs of these proceedings, including the legal fees incurred by the Fund, in an amount of no less than 50,000 Swiss francs on the grounds that his complaint is abusive.

D. In his rejoinder the complainant submits that he did complete the three preliminary stages of the internal dispute resolution process. On 6 February 2012 he was informed that his contract would be terminated on 7 May 2012 and he was asked to sign a termination agreement. On 11 February 2102 he wrote to the HR Director contesting the mutual separation agreement and requesting a meeting. By an e-mail of 3 March she informed him that his position was abolished but no official letter was sent to him. He reiterates that he wrote several times to the Director until 16 May, when she replied that she was out of the

office but would revert to him. The complainant wrote to her again on 7 July summarising all his previous requests in one e-mail, but received no answer. Therefore, he considers that the fourth stage of the internal resolution process was completed on 7 May 2012 when he separated from service, and he therefore rightly filed his appeal with the AB.

E. In its surrejoinder the Fund indicates that the complainant did engage in discussions with his subordinates in Human Resources, but he did not submit a formal grievance to his supervisor, the General Manager. In its view, he did not demonstrate that he had followed the grievance and dispute resolution procedure before filing his appeal. Indeed, his summary of the sequence of events does not make any reference to the applicable stages of the internal dispute resolution procedure.

CONSIDERATIONS

1. The complainant was employed by the Global Fund, which he joined in August 2011. There is an issue between the parties about when, ultimately, his contract was to conclude. It is unnecessary to detail the events relevant to this issue. It is sufficient to note that there was a contest in 2012 between the complainant and the Global Fund about whether, when and the basis on which the complainant's contract could be terminated. The complainant was aggrieved by the conduct of the Global Fund and sought to challenge its actions in an internal appeal. On 31 August 2012, the complainant received an e-mail communication on behalf of the Chair of the AB who had concluded that the complainant had "not gone through the formal grievance and dispute resolution procedure, which is a pre-requisite when submitting an appeal". The complainant was advised in the e-mail that, as the first step in the formal grievance and dispute resolution procedure, he should formally raise his grievance with his line manager. This rejection of his appeal is the impugned decision although the complainant also seeks to raise in these proceedings the substantial issues he sought to raise in

the internal appeal concerning the termination of his contract and related issues.

2. The complainant filed his complaint with the Tribunal on 20 October 2012. The Global Fund contends that the complaint is not receivable on two bases. The first basis centres on the filing of the complaint which is alleged to have been filed out of time. While the completed complaint form was filed on 20 October 2012, the brief was not filed until 3 December 2012. This occurred in circumstances where the Registrar exercised a power enabling the complainant to "correct" the complaint under Article 6, paragraph 2, of the Tribunal's Rules. The Global Fund argues that this is an impermissible use of the power conferred on the Registrar by Article 6 and, in the result, the completed complaint (complaint form and brief) was filed out of time. However the exercise of the power conferred by Article 6(2), additionally by Article 14 of the Rules, in similar circumstances has been sanctioned by the Tribunal's jurisprudence (see Judgment 1500, under 1 and 2). The Global Fund's challenge to receivability on this basis is rejected.

3. The second basis of the Global Fund's challenge to receivability concerns the need to exhaust internal remedies. It argues that, as a matter of fact, the complainant did not exhaust internal means of redress and, accordingly, the complaint is irreceivable having regard to Article VII, paragraph 1, of the Tribunal's Statute.

4. On 6 February 2012 the complainant received a letter informing him that his active duties would formally come to an end on that day and he would be placed on special leave until his remaining contract period ended on 7 May 2012. The letter contained the terms on which, from the Global Fund's perspective, this would occur. The complainant did not accept what was being proposed and challenged it in a telephone conversation with the HR Director the following day. A revised termination letter was sent on 10 February 2012 though it remained dated 6 February 2012. On 11 February 2012 the complainant wrote to the HR Director by e-mail. Much of the e-mail complained

about the way the complainant had been treated and the implications on his career. The complainant indicated that he was not prepared to sign anything until the organisation explained why he was being released and "a mutual conclusion" had been reached. He indicated he would then consider his position. The e-mail concluded with a request that the complainant be told when he would be able to meet with Mr J., the General Manager, to understand "his reasons for releasing [him] prior to the end of [his] contract".

On 3 March 2012 the HR Director e-mailed the complainant. It can be fairly described as a conciliatory e-mail addressing concerns raised by the complainant in the e-mail of 11 February 2012. It informed the complainant that the General Manager preferred to work directly with two of the complainant's previous direct reports and that under the new organisational structure the complainant's position had been abolished. The e-mail concluded with the HR Director indicating that she was available for any further questions and, as the complainant had requested, she would be ready and willing to organise a meeting with the General Manager.

The next communication is an e-mail of 22 March 2012 to the HR Director. The tone of the e-mail is matter of fact. The complainant points to several things that had not yet been done and, at least by implication, needed to be done.

5. On 3 May 2012 the complainant sent the HR Director a lengthy e-mail. It commenced with an acknowledgement that the HR Department may be under pressure but requested that the HR Director deal with matters that would facilitate his departure from Geneva. The complainant asserted that the Global Fund was treating his departure differently from other full-time employees and requested an explanation "of why this should be". The complainant then said:

> "As you know, I requested both an exit interview with Mr [J.] to understand the rationale behind his decision to cut my contract short and exclude me from any further activities within the fund. This request has never been granted and now it is clearly too late to have any value."

The e-mail then contains nine numbered paragraphs which are, in substance, complaints about things that had not been done and should have been done in relation to the complainant's departure. There then follows several more paragraphs in which the complaint identifies things that were not, but should have been, done by the Global Fund for his benefit. The complainant then said:

> "It would appear that it is too late for me to take advantage of some of the other benefits that should have been made available to me and I would like to discuss with you how I might be compensated for this omission together with compensation for the other negative elements of the organisation's actions that have disadvantaged me."

The complainant then complains about the unfair manner in which he had been treated but says:

> "However, I am sure that the situation can be rectified and would suggest that we meet urgently to discuss what actions the organisation should now take to properly compensate me for the way I have been treated and for the damage caused to my personal and professional reputation."

This request for an urgent meeting is repeated in the penultimate sentence of the e-mail, with the complainant noting that he would be away from Geneva between 4 and 12 May and that he and the HR Director "meet urgently on [his] return if [they] cannot meet this week before [he] leave[s]".

6. On 16 May 2012 the complainant e-mailed the HR Director complaining about the lack of response to his earlier e-mails. He said, amongst other things:

> "Despite requesting a meeting since the day of my departure and more recently in my last email attached below [the e-mail of 3 May], I have not had the courtesy of an offer to meet with anyone able to respond to the issues I have raised. Organising a meeting will become progressively more difficult for me as I am no longer regularly here in Geneva and it could be interpreted that this delay is a deliberate attempt by the organisation to make a resolution of these matters more difficult for me personally. I sincerely hope this is not the case."

Two paragraphs further on, the complainant said:

> "As I still do not have access to my terms and conditions, I am unsure on how to progress matters if no response remains forthcoming. I assume that I need to raise a formal grievance so that the process can begin and if that is

> the case please take this email as that formal notification. I have no wish to do anything other than follow the internal procedures but if you are unable to satisfy my request I have to reserve the right to go directly to legal action as time is clearly of the essence for me in this situation.
>
> Could I please ask you to read through my email of 3rd May and furnish me with the answers I require in order that we can try to draw this sad situation to a conclusion."

7. This e-mail is significant. Three things were said by the complainant. The first is that events had reached a point where, from the complainant's perspective, he had an unresolved grievance which he wanted to pursue under the applicable or appropriate grievance resolution procedures. The second was that he wanted this e-mail to be treated as formal notification of his grievance. The third, it can readily be inferred, was that the complainant was unsure of the procedures that should be followed.

The HR Director should have appreciated, and almost certainly did, that each of these three matters was being raised by the complainant with her. Also, she almost certainly would have known that, according to the Global Fund's Human Resources Regulations and Grievance and Dispute Resolution Procedure, the complainant was obliged to take up his grievance with his line manager and not with her. In those circumstances, she was obliged to forward the e-mail, described as "formal notification" of a grievance, to the person with whom the complainant should have been dealing, namely the complainant's line manager. The duty to do so is established by the Tribunal's jurisprudence (see, for example, Judgments 1832, under 6, 2882, under 6, and 3027, under 7). This formal notification had been preceded by e-mail correspondence which had detailed the subject matter of the complainant's grievance and it is apparent the complainant was raising issues of substance.

The HR Director responded by saying she was out of the office and had been for several days. She indicated she had asked another officer to review and prepare the letters the complainant sought. She said: "I will be back in the office next week and will revert". She assured the complainant there was no ill intent but that there were just

"huge volumes of matters to attend to and [that she was] steadily going through each […] of them".

8. On 17 July 2012, the complainant sent an e-mail to the Office of the AB attaching his "formal request for an appeal". The attached form, headed "Request for Appeal" contained several fields as a standard form document that the complainant had completed. The first required the complainant to "[i]dentify the Disputed Employment Matter(s) [he was] appealing". The complainant said that he was contesting "the Global Fund's tacit decision not to renew or amend the separation proposal offered to [him] on 10 February 2012 as well as the termination of [his] contract as of 7 May 2012". While there was further commentary in this field concerning the identification of the disputed employment matter, these extracts encapsulate the complainant's identification of the subject matter of the appeal. In the correspondence in evidence, the complainant repeatedly asserted that the decision to terminate his contract had been made by the General Manager who had assumed his position in the organization the day the letter of 6 February 2012 was sent. Thus, at least in relation to this aspect of his grievance, he was seeking to appeal internally against a decision of the General Manager. It is less clear who made the decision (if in fact such a decision was made) not to renew or amend the separation proposal.

9. At the time the complainant lodged his appeal on 17 July 2012, the applicable procedures were found in the Human Resources Regulations under the general heading of "Grievance and Appeal" as well as in the Grievance and Dispute Resolution Procedure. These provisions contemplated a four-stage process culminating with an appeal to the AB. They were clearly intended to create avenues to resolve any staff grievance before the final step of an appeal to the AB. The first step, identified in Regulation 850.1, was that "employees are encouraged to raise any issues, relating to their employment, in the first instance with their line manager with a view to early resolution". While this provision is not in mandatory language, it does make clear that this first step should be undertaken as a prelude to an appeal if the grievance was

unresolved. Indeed the fourth step, which is the formal appeal, is addressed in Regulations 860.1 to 860.5. Regulation 860.2 provides that "if an employee wishes to appeal after internal redress mechanisms have been exhausted, he/she may do so". Thus the right of appeal is conditioned by the exhaustion of the preceding steps of the internal proceedings.

10. It is not in dispute in the pleadings that the complainant's line manager had been the Deputy Executive Director. What the complainant did was engage in an e-mail dialogue with the HR Director. He did not take his grievances up with his line manager. However, as discussed earlier, the HR Director should have forwarded the complainant's formal notification in the e-mail of 16 May 2012 to the Deputy Executive Director. As this did not occur, the first step in the grievance and dispute resolution procedure was not taken. It should have been taken and the responsibility for this failure lies with the Global Fund.

While the issue of compliance with the grievance and dispute resolution procedure was raised by the Global Fund as an issue concerning the exhaustion of internal remedies, the submissions drew attention to a material flaw in the way the organization dealt with the complainant's grievance. For reasons given in two other judgments decided this session (see Judgments 3423 and 3424), the matter should be remitted to the Global Fund to permit the completion of the internal proceedings. Specifically, the HR Director should refer the complainant's e-mail correspondence to the Deputy Executive Director to enable the complainant to endeavor to resolve his grievance informally and, if necessary, thereafter lodge an appeal with the AB. The other steps preceding the formal appeal are inapt to apply to the complainant in the circumstances of this case.

11. The impugned decision should be quashed. In the specific circumstances of this case, no award of moral damages is made. The complainant is entitled to costs in the amount of 1,500 euros. In light of the above, the Global Fund's counterclaim for costs will be dismissed.

DECISION

For the above reasons,

1. The rejection of the complainant's internal appeal is quashed.
2. The complaint is sent back to the Global Fund so that the internal appeals procedures can be followed, as stated in consideration 10, above.
3. The Fund shall pay the complainant 1,500 euros in costs.
4. All other claims are dismissed as well as the Fund's counterclaim for costs.

In witness of this judgment, adopted on 14 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ