Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

O.-W. (Nos. 1 and 2)

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

120th Session **Judgment No. 3506**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms E. O.-W. against the Global Fund to Fight AIDS, Tuberculosis and Malaria on 1 June 2012 and corrected on 29 August;

Considering the letter of 24 September by which the Global Fund requested a stay of proceedings, the letter of 26 September by which the complainant submitted a similar request, as well as the e-mail and letter of the Registrar of the Tribunal of 28 November 2012 informing the parties that the President of the Tribunal had refused these requests;

Considering the letter of 17 January 2013 confirming that of 19 December 2012 by which the complainant informed the Registrar that she wished to withdraw her complaint, the letter of 29 January 2013 in which the Global Fund asked that the complainant be ordered to pay the costs occasioned by the complaint and the e-mail from the Registrar of 4 February informing the Fund that, for the Tribunal to rule on that request, the proceedings would have to be pursued;

Considering the reply of the Global Fund of 27 February 2013, the complainant's rejoinder of 22 April and the Fund's surrejoinder of 24 July 2013;

Considering the second complaint filed by the complainant against the Global Fund on 19 December 2012 and corrected on 24 January 2013, the Global Fund's reply of 21 May, the complainant's rejoinder of 26 June and the Fund's surrejoinder of 30 September 2013;

Considering the documents produced by the parties in response to the Tribunal's request for further submissions;

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 refusal of some of her requests for the defrayal of medical expenses.

The complainant entered the service of the Global Fund in February 2004 as Executive Assistant to the Executive Director. She was absent owing to illness on several occasions between November 2006 and March 2007. When she returned to work, a new Executive Director was on the point of taking office. The complainant states that he deprived her of any duties and sidelined her. On 7 January 2008 her post was abolished and she was reassigned.

The complainant was placed on sick leave as from February 2009. Having submitted a disability benefit claim, she was informed by a letter of 30 May 2011 that she had been awarded a 50 per cent permanent disability benefit backdated to August 2010 and that her disability was regarded as service-incurred. She was advised that her state of health would be re-evaluated at the end of 2011.

The complainant required hospital treatment as from 14 November 2011. The insurance company informed her by a letter of 16 November that it would not defray these hospitalisation expenses as the "maximum limit of coverage" had already been reached.

On 1 January 2012 the Global Fund transferred the management of its health insurance scheme to another insurance company, but the former insurance provider retained the management of disability

insurance. By an e-mail of 20 January 2012 the new insurer explained that, for the same reason, it would not defray the complainant's hospitalisation expenses. There was no reply to the two reminders which the complainant sent by to each of the insurance companies on 31 January.

By a letter of 6 March 2012 the complainant's counsel reminded the General Manager of the Global Fund that according to the relevant texts, 100 per cent of the expenses incurred as a result of a service-incurred illness should be covered by the health insurance policy. She therefore asked him to instruct the insurance providers to defray the outstanding bills and hospitalisation expenses for each of the periods concerned, i.e. from 14 November to 31 December 2011 and that commencing on 1 January 2012 respectively. She also requested the payment of interest. The Head of the Human Resources Department informed her by a letter of 15 March 2012 that, as she had failed to attend the medical evaluation in December 2011 to determine whether the continued payment of a disability benefit was justified, it was impossible to issue any instructions to the health insurance brokers in respect of the period after 31 December 2011. The complainant states that she ended the hospital treatment on 31 March 2012 owing to a lack of financial resources.

On 18 May the complainant submitted a Request for Appeal to the Appeal Board in which she opted for written proceedings. She requested relief similar to that requested on 6 March and, subsidiarily, asked the Global Fund itself to defray her hospitalisation expenses and to pay her interest. She also claimed moral damages. The complainant was again hospitalised between 30 May and 20 September 2012.

On 1 June the complainant filed her first complaint with the Tribunal, impugning the decision of 15 March. She mainly restated the claims which she had entered in her Request for Appeal of 18 May and also claimed costs in the amount of 10,000 Swiss francs.

The previous insurance company advised the complainant in a letter of 30 August 2012 that it agreed to cover the expenses incurred during the period ending on 31 December 2011 and that the medical expenses incurred as from 1 January 2012 might also be defrayed

provided that "they are work-related" and "subject to the prior approval of the insurance company's medical officer". The complainant was notified of the Administration's response to her appeal by an e-mail of 5 September. She was informed in the same e-mail that, as the previous insurance company had decided to cover her hospitalisation expenses, the Chair of the Appeal Board considered the matter to be settled and in consequence had "suspended" her appeal. On 27 September the complainant wrote to the Appeal Board and protested that the matter was not settled. She asked the Global Fund to instruct the insurance company which had been managing the insurance scheme since 1 January 2012 to reimburse her hospitalisation expenses for the period between that date and 31 March 2012, with interest. She also pressed her claim for moral damages. The Appeal Board replied that it did not have the mandate to address decisions taken by the insurers.

The complainant informed the Registrar of the Tribunal by a letter of 19 December 2012 that the Appeal Board had closed its examination of her appeal, despite the fact that some points remained unresolved, and that since then the Administration had not given a final decision. She informed the Registrar that she wished to withdraw her first complaint and to file a second one impugning the implied decision to dismiss her internal appeal. In this second complaint she asks the Tribunal to set aside the decision of 15 March 2012 and to order the Global Fund to instruct one or other of the insurance companies to defray her hospitalisation expenses for the period between 1 January and 31 March 2012 and to pay her interest as from 15 February 2012. Subsidiarily she requests that the Global Fund itself be ordered to defray her hospitalisation expenses as from 1 January 2012 and to pay her interest. She also claims 50,000 Swiss francs in compensation for moral injury and 10,000 francs "in costs and towards [her] counsel's fees".

The Global Fund submits that the first complaint is irreceivable because internal remedies have not been exhausted and that the Tribunal is not competent *ratione materiae*. It asks the Tribunal to declare the complaint vexatious and to order the complainant to pay it 25,000 Swiss

francs in costs and towards "legal expenses". The Global Fund also asks the Tribunal to "declare that the complainant's withdrawal of her complaint carries the 'authority of *res judicata*' and that she may no longer bring a complaint, even a similar one, before an international (or a domestic) court".

In her rejoinder regarding her first complaint, the complainant asks the Tribunal to dismiss all the Global Fund's claims and to order it to reimburse "all [her] legal expenses" and to pay her 5,000 Swiss francs towards "[her] counsel's fees". In its surrejoinder the Global Fund maintains its position.

In its reply to the second complaint, the Global Fund contends that the withdrawal of the first complaint has "*res judicata* authority" and that the complainant may not therefore file a similar, if not identical, second complaint with the Tribunal. In addition, the Global Fund explains that it is not party to the dispute between the complainant and the insurance companies and that the Tribunal is not therefore competent to hear the complaint. It adds that the claims which are receivable *ratione materiae*, namely those related to the award of damages and a contribution towards counsel's fees, are irreceivable since internal remedies have not been exhausted. As the Global Fund considers the complaint to be vexatious, it asks the Tribunal to order the complainant to pay the "costs of the proceedings" as well as 20,000 francs "towards the lawyer's fees entailed by her rash conduct".

In her rejoinder regarding her second complaint, the complainant endeavours to show that all her claims are receivable and she adds further claims that the Global Fund should instruct the insurance companies to cover the costs of other medical treatment up until 30 June 2013 or, subsidiarily, that the Global Fund should itself defray these expenses. She asks the Tribunal to order the Global Fund to bear the "costs of the proceedings" and increases the sum she claims "for costs and towards [her] counsel's fees" to 15,000 francs. In its surrejoinder the Global Fund reiterates its position.

CONSIDERATIONS

1. In substance, the two complaints, one of which was filed a few days after the matter was referred to the Appeal Board, the other after the proceedings before the Board had been suspended, seek to challenge the refusal of Global Fund's authorities to take steps to ensure that the organisation's insurers would cover the complainant's medical expenses.

2. These complaints basically seek the same redress and are largely interdependent; they will therefore be joined to form the subject of a single judgment.

3. The complainant withdrew her first complaint by a letter of 17 January 2013. This withdrawal of suit was not accompanied by any reservations and, as the defendant organisation informed the Tribunal on 29 January that it had "absolutely no objection" to the withdrawal, it is hereby recorded.

4. Notwithstanding this withdrawal of suit, the Fund insisted on pursuing the proceedings, as it wished to claim costs against the complainant on the grounds that the complaint was vexatious.

Without ruling out, as a matter of principle, the possibility of making such an order against a complainant (see, for example, Judgments 1884, 1962, 2211 and 3043), the Tribunal will avail itself of that possibility only in exceptional situations. Indeed, it is essential that the Tribunal should be open and accessible to international civil servants without the dissuasive and chilling effect of possible adverse awards of that kind. In the instant case, the aforementioned complaint cannot be regarded as manifestly vexatious, even though it was clearly irreceivable because internal remedies had not been exhausted. The Fund's counterclaim will therefore be dismissed.

5. In her rejoinder the complainant in turn asked that the defendant organisation be ordered to pay her costs for having needlessly

pursued the proceedings related to this complaint. In the circumstances of the case, there are no grounds for granting this claim either.

6. So far as concerns the second complaint, which will be examined below, it must first be noted that, as matters now stand, the dispute before the Tribunal concerns only the defrayal of the hospitalisation expenses incurred by the complainant between 1 January and 31 March 2012.

Although in her rejoinder the complainant extended her claims to include the reimbursement of costs related to other medical treatment which she received up until 30 June 2013, she has informed the Tribunal in her further submissions that the expenses in question have since been covered by the insurance company concerned. This additional claim has therefore now become moot.

7. The Fund raises several objections to the receivability of the complaint.

8. The Tribunal will not accept the defendant organisation's objection that, in view of the withdrawal of the first complaint, the complainant is effectively barred from lodging another complaint raising substantially the same issues.

As the complainant's counsel explained in a letter to the Tribunal of 19 December 2012, the first complaint was withdrawn precisely on account of the concomitant filing of a second complaint following the closure of the internal appeal proceedings. Indeed, the above-mentioned letter of 17 January 2013 expressly stated that the complainant intended to take this step "in view of her new complaint". It is therefore perfectly clear that the complainant was not thereby waiving her right of action to file any complaint seeking the same redress as the first complaint, but merely withdrawing the proceedings, which does not have the same effect. It is plain that neither the withdrawal of suit itself nor the *res judicata* authority of this judgment by which the withdrawal is recorded precludes the filing of the second complaint in question.

9. The Global Fund then submits that the Tribunal is not competent to hear this dispute, as it is a dispute between the complainant and the insurance companies and, in its opinion, does not concern the organisation itself. The Fund is, however, greatly mistaken as to the nature of this dispute and the duties incumbent upon it in this case.

International civil servants' social protection forms an integral part of their terms of employment, which are the responsibility of the organisation for which they work. For this reason, despite the defendant organisation's insistence to the contrary, where an organisation entrusts the responsibility for providing social protection to a private insurance company, as is the case here, the organisation has a duty to ensure that the insurer correctly processes the claims submitted by insured persons. In this situation, the organisation is in fact liable for the acts of its insurer (see, for example, Judgments 2063, under 8, or 3031, under 14, 18 and 19).

In the instant case, the matter raised by the complainant is not in dispute between her and the insurance company, but between her and the Fund itself, and it concerns precisely the latter's compliance with its duty to ensure the proper examination of a claim for the reimbursement of medical expenses. This matter does fall within the Tribunal's competence (see, for example, in addition to the aforementioned Judgments 2063 and 3031, Judgments 2249 and 3030).

10. Nor will the Tribunal accept the objection to receivability based on the contention that the letter of the Head of the Human Resources Department of 15 March 2012 does not constitute a decision. It is plain on reading that document that its author expressed therein her refusal to call upon the insurance company concerned to pay the disputed hospitalisation expenses and, in so doing, refused a request made by the complainant's counsel on 6 March. This letter was therefore a decision adversely affecting the complainant and, as such, could be challenged in an internal appeal.

11. Lastly, the Global Fund submits that the complaint is irreceivable pursuant to Article VII, paragraph 1, of the Statute of the

Tribunal, because the internal remedies available to the organisation's staff members have not been exhausted. However, unlike the complainant's first complaint, the second complaint could properly be brought before the Tribunal at the stage of the internal proceedings when this occurred.

The evidence in the file shows that the Chair of the Appeal Board, on being informed that, after the Fund had intervened, the insurance company had eventually agreed to reimburse the expenses at issue, thought that he could infer from this that the case under consideration had been settled and he then decided to "suspend" the appeal proceedings. Despite her vigorous protests, the complainant, who was advised of this decision on 5 September 2012, has never been able to obtain the reopening of these proceeding which remain *de facto* definitively closed. This decision was manifestly ill-founded insofar as the insurance company had formally undertaken to reimburse only some of the expenses in question and the complainant's internal appeal also included a claim for moral damages which had not been examined by the Appeal Board. Moreover and above all, the Board flagrantly flouted the rules of the Operating Procedures for Appeal by not drawing up any report upon the conclusion of the proceedings, thus making it impossible for the Executive Director to adopt a final decision on this appeal.

In these circumstances it is clear that, although the means of internal redress were not exhausted, the responsibility for this situation does not lie with the complainant, but with the Appeal Board itself and hence with the Fund as guarantor of the correct functioning of the Board. Furthermore, the defendant organisation's plea that the complainant could submit a new appeal is beside the point and borders on bad faith, because a staff member can hardly be required to repeat a step on which the organisation neglected to follow up.

As the Tribunal has consistently held in such circumstances, pursuant to Article VII, paragraph 3, of its Statute, the complainant could therefore impugn directly before the Tribunal the implied decision arising from the absence of an explicit decision at the end of the internal appeal proceedings (see, for example, Judgments 2070, under 5, 2562, under 5 and 6, and 2866, under 5).

12. On the merits, the Tribunal notes that, after initially denying the possibility of reimbursing 100 per cent of the complainant's hospitalisation expenses, the insurance company, by a decision of 30 August 2012, agreed in principle to cover the expenses at that rate. Indeed, it accepted that the complainant's illness was service-incurred, which entitled her to full coverage under section B40.1 of Annex B to the Fund's Staff Health Insurance Plan Regulation and section 2.1.1 of Article 16 of the organisation's insurance contract. Moreover it was this change of stance on the part of the insurer which led the Chair of the Appeal Board to consider that proceedings before the Board should be closed, as stated earlier.

13. Although it then covered the hospitalisation expenses for the period prior to 1 January 2012, the insurance company made the reimbursement of those incurred by the complainant after that date subject to re-evaluation of her condition. After a medical examination in February 2013 confirmed that the complainant's illness was service-incurred, the insurance company defrayed the medical expenses referred to under 6, above, which had been incurred by the complainant between 1 April 2012 and 30 June 2013, as it had agreed to do. However, inexplicably, it did not settle the claim for hospitalisation expenses for the period between 1 January and 31 March 2012 which had been submitted to it on time and which it no longer had any reason to reject.

14. While it is surprising that the complainant did not at that juncture take the initiative of again asking the insurance company to reimburse that sum, which would have doubtless been the simplest solution, it is equally strange that the Fund, which was fully informed of the existence of this dispute, did not bother to remind the insurance company of its obligation to the complainant.

15. It is true that on 15 March 2012, when the decision initially impugned by the complainant was taken, and likewise on the date when the implied decision dismissing her internal appeal against it must be deemed to have been adopted, the re-evaluation referred to above had not yet taken place, with the result that it was uncertain whether the

complainant was entitled to full coverage of the expenses in question. However, bearing in mind first, that following a first evaluation in March 2011 the complainant's illness had already been recognised as service-incurred and, secondly, the critical situation of the complainant, who had had to break off her hospital treatment on 31 March 2012 owing to a lack of financial resources, the Tribunal considers that in the instant case it was the organisation's duty to instruct the insurance company to cover these expenses as a precautionary measure.

16. It follows that the impugned implied decision and the aforementioned decision of 15 March 2012 must be set aside.

17. In accordance with the principle recalled to under 9, above, it was incumbent upon the Fund to ensure that the insurance company was correctly honouring its obligation to reimburse the expenses borne by the complainant. In this case the organisation clearly neglected that duty.

18. In view of this situation, the complainant principally asks the Tribunal to order the Fund to instruct the insurance company to defray her hospital expenses for the disputed period. Such a claim is irreceivable, since it is firmly established by the case law that it is not for the Tribunal to issue injunctions against organisations (see, for example, Judgments 2370, under 19, or 2541, under 13).

19. However, as the organisation is liable for the acts of its insurer, in accordance with the subsidiary claim entered by the complainant, the Fund itself must be ordered to reimburse the disputed expenses, which it may then seek to recover from the insurance company.

20. The organisation will thus have to pay the complainant a sum equivalent to the expenses incurred by her in respect of her hospitalisation between 1 January and 31 March 2012, which, according to the undisputed figure in the file, amounted to 8,647 Swiss francs. This sum shall bear interest at the rate of 5 per cent per annum as from the date on which it was actually paid by the complainant.

21. The complainant submits that, in dealing with this case, the Fund breached the duty of care that it owed her as a staff member.

The Tribunal shares this opinion. It is plain from the evidence in the file that, if it had acted with greater diligence and benevolence, the Fund could have sped up the reimbursement of the sums claimed as medical expenses by the complainant. In particular, it must be noted that it was not until the internal appeal was examined by the Appeal Board at the end of August 2012 that the organisation's services decided to call on the insurance company to settle the sums in question. The fact that this step then made it possible immediately to resolve a substantial part of the dispute shows that it would indubitably have been worth taking it earlier. Similarly, with regard to the 8,647 francs, the sole outstanding amount, as already stated, it is unjustifiable that the organisation did not see the need to ensure that this sum was paid by the insurance company. These breaches of the Fund's duty of care, which are even less excusable given that its services were aware of the complainant's critical state of health, plainly caused her moral injury. In these circumstances the Tribunal considers that the compensation due to the complainant for this injury may be fairly assessed at 10,000 francs.

22. The complainant, whose second complaint is allowed for the main part, is entitled to costs, which the Tribunal sets at 5,000 francs.

23. The Fund has submitted the counterclaim that the complainant should be ordered to pay its costs on the grounds that her complaint is vexatious. It may be concluded from the foregoing that this counterclaim must obviously be dismissed.

DECISION

For the above reasons,

1. The withdrawal of the first complaint is hereby recorded.

2. The implied decision of the Executive Director of the Global Fund dismissing the complainant's internal appeal and the decision of

the Head of the Human Resources Department of 15 March 2012 are set aside.

3. The Fund shall pay the complainant 8,647 Swiss francs to cover her hospitalisation expenses for the period between 1 January and 31 March 2012, together with interest thereon, as indicated under 20, above.

4. There is no need to rule on the complainant's claim that the Fund should be ordered to defray the expenses related to other medical treatment which she received up until 30 June 2013.

5. The Fund shall pay the complainant 10,000 francs in moral damages.

6. It shall also pay her costs in the amount of 5,000 francs.

7. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2015, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

(Signed)

CLAUDE ROUILLER SEYDOU BA PATRICK FRYDMAN

DRAŽEN PETROVIĆ