Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

M.

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

121st Session **Judgment No. 3612**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs P. M. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter "the Global Fund") on 9 May 2013, the Global Fund's reply of 5 June 2014, the complainant's rejoinder of 17 October 2014 and the Global Fund's surrejoinder of 22 January 2015;

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:

After her separation from service in December 2012 on the basis of a separation agreement, the complainant challenged the Global Fund's failure to follow the proper procedure with respect to her performance appraisal report for 2011.

The complainant worked for Global Fund from November 2009 to 12 June 2012. In 2012 the Global Fund underwent a significant restructuring. Some employees, including the complainant, were identified as requiring support with regard to their competencies, performance, skills or their ability to meet the new requirements resulting from the restructuring. The complainant, like others in her situation, was

offered two options: continue working in the same role but on a different post while agreeing to participate in a work program aimed at improving her skills to ensure success in her new functions, or sign a separation agreement. She was informed of the options in late March 2012 and she asked to be given some time to give her response. She then requested clarification as to the grounds on which the Global Fund had concluded that her skills and performance did not reach the level required for the new position and asked to discuss her performance appraisal for 2011 with her supervisors. In early April 2012 she was shown the 2011 "Dialogue Report" and was given information on her performance. In order to facilitate the performance support efforts she was given the possibility of remaining in her role of Fund Portfolio Manager but being reassigned from the Africa team to the Latin America and Caribbean team under the supervision of a new supervisor. On 5 April she confirmed her interest in being reassigned, which was done as from mid-April. She was then placed on a monitored work program for six weeks in order to confirm the level of performance expected from her and to identify specific actions needed for improvement. She was informed that in the event that she did not demonstrate the expected performance level during that period, she would be placed on a formal performance improvement plan as provided for in the Human Resources Regulations and in the Human Resources Procedures.

In May 2012 she approached the Human Resources Department (HRD) to discuss the possibility of signing a mutually agreed separation, despite the fact that she had been informed on 11 April 2012 that if she decided to be reassigned, there would be no further opportunity for a separation agreement. The Administration nevertheless agreed to revisit its position and, on 29 May, the complainant accepted the proposed separation agreement. According to the agreement, she was placed on special leave with full pay from 1 June 2012 to 31 December 2012, when her employment formally ended. One of the clauses of the agreement provided that she undertook to refrain from filing an appeal or a complaint against the Global Fund "arising directly or indirectly from any decision, action or event taken or occurring during the period of […] employment with the Global Fund, or for any other reason".

In January 2013 she raised issues with Global Fund with respect to her performance evaluation for 2011, and asked to be provided with her performance evaluation records for that year. On 15 February 2013 the Administration sent her copies of the requested performance evaluation forms for 2010 and 2011. That is the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to order that she be immediately provided with the complete 2011 "pre calibration and post calibration evaluation report", and that the 2011 appraisal report reflect the "pre calibration comments" only. She also asks the Tribunal to invalidate the separation agreement, to grant her compensation for the Global Fund's negligence, bad faith and breach of its duty of care, and to award her moral damages. She further seeks the "[s]ymbolic condemnation" of the Fund for its failure to show due respect in dealing with her performance evaluation, the reimbursement of her legal fees, and to be provided with adequate reference letters for future employment opportunities.

The Global Fund asks the Tribunal to dismiss the complaint as irreceivable and unfounded. It seeks an award of costs against the complainant in the amount of at least 40,000 Swiss francs on the ground that the complaint is vexatious.

CONSIDERATIONS

1. The complainant is a former employee of the Global Fund. She actively served with the Global Fund from November 2009 until 12 June 2012, and was placed on special leave with full pay until her separation on 31 December 2012 under the terms of a mutually agreed separation agreement which she signed on 29 May 2012. Prior to her separation, the Global Fund underwent a significant restructuring in which several employees (including the complainant) were identified as requiring support with regard to their abilities to meet the requirements expected pursuant to the Global Fund's new objectives. These employees were offered two options: continue working in the same role while agreeing to participate in a work program aimed at ensuring success in their new position or accepting a separation agreement. The complainant

requested more information regarding the grounds on which the Global Fund had concluded that her skills and performance were insufficient and asked to meet with her supervisors to review her performance evaluation for 2011.

2. In a meeting in April 2012, the complainant's performance was discussed and she was shown her 2011 performance evaluation. Her follow-up emails showed her commitment to improving the issues discussed in that meeting and the complainant, rejecting the offer to sign a separation agreement, agreed to be reassigned to another department, performing the same functions, on a six-week monitored work program to confirm her level of performance, with the agreement that if she did not demonstrate the expected performance level she would be placed on a formal Performance Improvement Plan (PIP).

3. In May 2012 the complainant requested information on a new separation agreement. This offer was made on 25 May and signed by the complainant on 29 May 2012. The terms of the separation agreement included the details of the lump sum payments to be made to the complainant as well as the payment of her salary, allowances and entitlements for the period up to the date of her separation (31 December 2012), information regarding the time limits for her health insurance coverage and other benefits and immunities. It also detailed that all Global Fund's property and identification documents was to be returned and that she would not be permitted to work for the Fund for a period of five years following her separation from service. By signing the agreement she also certified that "[she had] not filed and irrevocably agree[d] that [she would] not file, assert or pursue in any forum, any appeals or claims against the Global Fund or against any directors, officers or staff members (both former and current) of the Global Fund arising directly or indirectly from any decision, action or event taken or occurring during the period of [her] employment with the Global Fund, or for any other reason". The agreement further specified that "[t]he agreement [was] based on full and final settlement of any and all contractual and/or statutory claims that [the complainant] could bring against the Global Fund, including claims for personal injuries arising

out of employment with the organization" and that "[i]n the event of breach by [the complainant] of any clause in this agreement, the Global Fund reserves the right to bring such legal action or other form of remedy as it may be entitled to under law or in equity".

4. In January 2013 the complainant asked HRD to provide her with her performance records for the year 2011. She received an email from HRD dated 15 February 2013, with the requested documents attached. The email reads as follows:

> "Dear [complainant],
>
> Attached please find your Global Fund Performance Evaluation Forms for the 2010 and 2011 cycles.
>
> We regret the delay, and thank you for your forbearance.
>
> Please do not hesitate to revert to us if you need any further clarifications.
>
> Best regards,
>
> [HRD]."

The complainant impugns that decision in her present complaint. She bases her complaint on the following grounds:

(a) violation of the performance management procedure:
- she was only given her 2011 performance appraisal on 15 February 2013 instead of prior to the proposal for termination of her contract;
- the 2011 appraisal report contained discrepancies due to errors made by the administration at the time of the "calibration" process; and
- her supervisors entered the final comments on her appraisal report in April and July 2012 but did not complete the overall review at that time;

(b) the separation agreement was flawed:
- the establishment of the agreement was an abuse of power;
- she was put under pressure to sign the separation agreement or go through a PIP; and

– she signed the separation agreement under duress;

(c) the Global Fund acted in bad faith as it knew that the 2011 appraisal process was irregular.

5. The Global Fund asserts that the complaint is irreceivable on the grounds that the complaint does not meet the conditions of receivability provided by Article VII of the Statute of the Tribunal:

(a) the email of 15 February 2013 is not a "decision" within the terms of Article VII as it cannot be considered an administrative decision negatively affecting the complainant;

(b) even if that email were to be considered an administrative decision negatively affecting the complainant, it cannot be considered a "final decision" as the email was authored by an HRD employee with no authority to issue a final decision concerning a grievance; and

(c) the complainant has not exhausted all internal means of redress as, even considering the email of 15 February 2013 to be a proper administrative decision (which the Fund rejects), it was not challenged in an internal appeal procedure as provided by the Employee Handbook and its Annex X, and as required by Article VII of the Tribunal's Statute.

The Global Fund submits a counterclaim for costs in an amount of no less than 40,000 Swiss francs as it considers the complaint to be manifestly irreceivable, in breach of paragraph 6(ii) of the separation agreement, vexatious, unsubstantiated, in breach of good faith and a clear abuse of process.

6. The complaint is irreceivable. The complainant impugns the email of 15 February 2013 in her complaint. The Tribunal finds that that email is not a decision in accordance with Article VII, paragraph 1, of its Statute. The wording of that email, as quoted above, cannot be construed in any way to convey an explicit or implicit decision which negatively affects the complainant. It is a mere courtesy response (including the attachment of the requested document) to a former employee who requested a copy of a document.

7. Considering the substance of the complainant's submissions, the Tribunal understands that the complainant is essentially challenging her 2011 performance appraisal, which she considers not to have been done in accordance with the proper rules of procedure, and the consequence it had on her separation. The complainant asserts that the Fund violated the Human Resources Regulation 11 and the performance management procedure by not providing the 2011 dialogue before proposing the termination of her contract. She submits that "[b]y terminating the complainant's contract through a short PIP first then a [separation agreement] <u>on grounds of performance</u> although never providing the final signed evaluation report confirming or [inferring] the alleged underperformance, the Global Fund has committed a serious error of law and violated the rules and management performance procedure" [original emphasis].

8. The complainant requests the Tribunal, inter alia, to order that the 2011 appraisal report reflect the pre-calibration comments and to invalidate the separation agreement. The Tribunal notes that the separation agreement which she signed on 29 May was not the original separation agreement offered on the grounds of performance, but was instead a separation agreement which she herself had requested.

9. The complainant alleges that her 2011 appraisal report contained discrepancies and was incomplete, that she did not receive any information on her supposed underperformance prior to the offering of the original separation agreement, and that this situation caused her to request and sign a separation agreement which consequently was flawed.

10. The Tribunal considers that before leaving the Global Fund (on 31 December 2012), the complainant had sufficient time to request all pertinent information regarding her 2011 performance appraisal and to lodge an internal appeal against any disputed aspects of it. In fact she was made aware of the content of her 2011 appraisal report by, at the latest, mid-2012. The fact that she subsequently ceased to be an employee of the Global Fund did not deprive her of the possibility of

pursuing the internal appeal proceedings to the end (see Judgment 3423, under 7(b)). Under this aspect, the complaint is irreceivable as the complainant did not exhaust all means of internal appeal in accordance with Article VII, paragraph 1, of the Tribunal's Statute.

11. The complaint is also time-barred as it challenges acts more than 90 days after the complainant acknowledged receipt of them. The claim that the complainant became aware of the flaws in these acts only when the Fund replied to her request for a copy of the 2011 performance evaluation is unconvincing. The complainant was aware as early as April 2012 that her performance was an issue. Therefore she should have requested a complete copy of her 2011 performance evaluation at that time and she should have subsequently contested either the contents of that appraisal or the lack of a response to her request, if necessary. To ignore the time limits established by applicable rules and by the Statute of the Tribunal would undermine the legal certainty which is guaranteed by those limits.

12. In light of the above considerations, the complaint must be dismissed and the Tribunal shall not treat the merits of the case. The circumstances of this case do not warrant an order for costs against the complainant, and, accordingly, the Global Fund's counterclaim must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed, as is the Global Fund's counterclaim.

In witness of this judgment, adopted on 28 October 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ