

B. (No. 2)

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

125th Session

Judgment No. 3921

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr E. B. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter “the Global Fund”) on 16 June 2015 and corrected on 24 July, the Global Fund’s reply of 19 November 2015, the complainant’s rejoinder of 25 January 2016 and the Global Fund’s surrejoinder of 13 May 2016;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 13 of its Rules;

Considering the application to intervene filed by Mr M. A. R. M. on 25 January 2016;

Considering the applications to intervene filed by Ms H. H. B. A.-A. and by Mrs M. A. D.-S. on 25 January 2016 and corrected on 9 February;

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 modifications to the grading and salary structure.

In 2013 the Global Fund commissioned an external study of its Reward and Recognition Framework. The objective of the study was to review the salary structure, which included the grading structure and

the salary scales applicable to each grade. The existing salary structure had been in place since 1 January 2009 when the Global Fund separated from the World Health Organization (WHO).

On 8 September 2014 the Executive Director informed employees that the Global Fund Board had approved the proposed changes to the grading and salary structure, and that these changes would be effective from 1 October 2014.

A few months later, members of the Staff Council, including the complainant, filed a Request for Resolution with the Human Resources Department (HRD) in their individual capacity and as representatives of the Staff Council. They contested the changes made to the grading system and the salary structure that “became effective as per 24th October in [their] payslips”. They asked that the Global Fund revert to the old system with effect from 1 October 2014 or that it establish another salary scale maintaining the minimum salary base which was applied under the previous system, and that employees recruited before the entry into force of the new structure be allowed to re-negotiate their existing salary in the same way as new employees, which they were not allowed to do when they signed their first contract. They also asked that a proper and adequate promotion policy be established after consultation with the Staff Council, and that the “Staff Council’s full membership on decisional bodies taking decision affecting interests or welfare” of staff be reintroduced. They asked that a document be signed by the Administration and the Staff Council indicating the “rules of engagement for consultations” in line with the Tribunal’s case law.

On 19 March 2015 the Head of HRD wrote to the members of the Staff Council detailing the Administration’s position concerning the new grading and salary structure. That is the decision the complainant impugns before the Tribunal in his capacity as a staff representative and as an employee.

The complainant asks the Tribunal to order the Global Fund to cancel the policy on the new grading and salary structure, and to ensure that information is shared with the staff and the Staff Council and that appropriate consultation takes place concerning any matters dealing with new policies concerning the staff. He asks the Tribunal to order

the Global Fund to “[r]einstall [...] Staff Council’s full membership” on bodies that are responsible for taking decisions affecting the interests or welfare of staff, and to ensure that when a new grading and salary structure is put in place, employees who benefit from the “grandfathered WHO entitlements” are not put at a disadvantage. He asks the Tribunal to order the Global Fund to establish a proper and adequate promotion and career development policy in full consultation with the Staff Council. He asks the Tribunal to order the Global Fund to avoid “inequity” between employees recruited prior to the entry into force of the new structure and those recruited after by allowing the former to re-negotiate their “salary base” taking into consideration the elements of experience, qualifications and skills that were not taken into consideration when they signed their first contract with the Global Fund. He also claims compensation for loss of income, moral damages and costs.

In his rejoinder, the complainant rephrases his claims for relief and adds that he requests the Tribunal to order the cancellation of the survey on the basis of which the new policy was introduced.

The Global Fund asks the Tribunal to dismiss the complaint as irreceivable on the grounds that the complainant does not have standing to pursue claims on behalf of other staff members who are not parties to the proceedings and because the Tribunal is not competent to grant the relief sought. It emphasises that the Tribunal is not competent to order injunctions. In its surrejoinder, the Global Fund points out that in his rejoinder the complainant seems to abandon almost every claim he made in the complaint and introduces new claims. These new claims are irreceivable. It otherwise asks the Tribunal to dismiss the complaint as being without merit.

CONSIDERATIONS

1. The complainant is a staff member of the Global Fund. On 16 June 2015 he filed a complaint with the Tribunal impugning, in terms, an administrative decision of 19 March 2015. This is a reference to a letter of that date from the Head of HRD dealing with a Request for Resolution lodged by the complainant on, it appears, 21 January 2015

though the document is dated 22 December 2014. The complainant indicated he was submitting the request both as an individual and as a Staff Council representative.

2. Without descending into detail, the subject matter of the grievance identified in the document was the introduction of a new salary structure and grading system for staff of the Global Fund that, according to the complainant, “became effective as per 24th October in [their] payslips”.

3. It should be noted, at the outset, that the complainant says in his brief that he is “submitting this claim [to the Tribunal] in [his] capacity of a staff member and an elected staff representative”. He was, at the time the complaint was filed, the Chair of the Staff Council. The complainant also refers, in his pleas, to his membership of a staff committee. It can be assumed this is a reference to the Staff Council. In addition, he expressly advances several arguments in his brief and effectively invites the Tribunal to address “additional [arguments] included in [his] initial request for resolution”. The Tribunal has stated on a number of occasions and recently with increasing frequency that it is inappropriate to effectively incorporate by reference into the pleas in the Tribunal, arguments, contentions and pleas found in other documents, often a document created for the purposes of internal review and appeal (see, for example, Judgment 3692, consideration 4). In this matter, the Tribunal will only have regard to arguments in the complainant’s brief and rejoinder and will disregard any additional or other arguments in the Request for Resolution.

4. The Global Fund raises, in its reply, the receivability of the complaint. It argues that the complainant has not identified any non-observance, in substance or in form, of the terms of his appointment or of the provisions of the Staff Regulations, referring to Article II, paragraph 5, of the Tribunal’s Statute. The Global Fund also argues that the complainant has no standing to seek to challenge the new salary structure and grading system on behalf of all staff of the Global Fund.

5. In his rejoinder, the complainant seeks to answer these arguments by quoting (without referring to the case but seemingly it is a quotation from Judgment 3449, consideration 3) what was said to be the Tribunal's case law concerning the right of staff committee members to bring a complaint to preserve common rights and interests. The complainant also argues that he is entitled to maintain the present claim in his capacity as a staff member because "the implementation of the new policy on grading has a direct and negative impact on [his] career".

6. As to the complainant's right to maintain these proceedings on behalf of the staff of the Global Fund in his capacity as a member of the Staff Council, there is some support for the proposition he can do so in earlier jurisprudence of the Tribunal (see, for example, Judgment 2919, consideration 5). However that judgment does not reflect the Tribunal's current case law (see, for example, Judgments 3515, consideration 3, and 3642, considerations 9 to 12 and 14). The adoption of the new arrangements in relation to salary structure and grading system was a general decision requiring implementation for each staff member. That general decision cannot be challenged by an individual staff member even if that individual is a member of the staff committee unless and until the general decision is implemented. That is not to say, it cannot be challenged when implemented by challenging a payslip that reflects its implementation. A recent example concerned a salary freeze where the complainants were able to challenge the general decision by challenging its implementation in a payslip. While the general decision to freeze salaries was not immediately reflected in the payslips (the complainants' salaries remained the same and the freeze would only operate in the future), the Tribunal was able to conclude, in that case, that the general decision as implemented in the payslips was liable to cause injury because the decision to freeze salaries would necessarily negatively impact on the salaries in due course (see Judgment 3740, consideration 11). Nonetheless, as a matter of general principle, a complainant must, in order to raise a cause of action, allege and demonstrate arguably that the impugned administrative decision caused injury to her or him or was liable to cause injury (see, for example, Judgment 3168, consideration 9).

7. In the present case the complainant appears to identify three ways in which the new salary structure negatively impacted on him and thus caused him injury or was liable to cause him injury. The first was that he had not had the opportunity to negotiate his starting salary, unlike new employees to whom these arrangements will be applied. The second was that the implementation of these arrangements constituted a breach of a commitment to maintain his salary as if he had remained on the staff of WHO (like some other staff of the Global Fund, the complainant had formerly been employed by WHO but subsequently was directly employed by the Global Fund). However no specifics, in relation to the complainant, are provided. There is not a scintilla of evidence of immediate or future injury to him on these two alleged bases of injury. Accordingly the complainant does not have, in these respects, a cause of action and, to this extent, his complaint is irreceivable.

8. The third way in which the new arrangements impacted on the complainant was identified in his rejoinder and concerned the calculation of future performance-based salary increases. While the Global Fund contests this proposition that the calculation of future performance-based salary increases for the complainant will be adversely affected by the new arrangements, and illustrates why it is wrong, the complainant does provide some evidence and specifics (even though contested) to support this plea. In this respect, the complainant has a cause of action and his complaint is receivable but only on this limited basis. Before considering this issue, it is desirable to refer to a plea of the complainant concerning consultation.

9. Much of the argument in the complainant's brief concerns a failure of the Global Fund to consult (or meaningfully consult) the Staff Council or the staff. However the complainant does not refer to any staff rule or regulation or provision in the Global Fund's Employee Handbook that requires consultation with the Staff Council or, for that matter, the staff. While good management practice would suggest such consultation is desirable, the case law of the Tribunal which has insisted on consultation and set aside decisions where there has been none (see,

for example, the discussion in Judgment 3883, considerations 20 to 21) has been rooted in a legal obligation imposed by a normative legal document (for example, a staff rule or regulation) that the organisation consult a specified body in a specified way (see, for example, Judgments 3736, consideration 7, and 3449, consideration 7). It will be the terms of the normative legal document that will provide the yardstick by reference to which the content of the obligation to consult will be measured and whether it has been satisfied. Insofar as the complainant alleges that there has been a failure to consult without pointing to any legal requirement for such consultation, he has no cause of action and, in this respect, the complaint is irreceivable. In this respect the complainant does not, as the Global Fund argues, point to any non-observance of the terms of his appointment or of the Staff Regulations, to use the language of Article II, paragraph 5, of the Tribunal's Statute.

10. It is thus necessary only to address the complainant's pleas in relation to the issue referred to in consideration 8 above and the responsive pleas of the Global Fund on that issue. The Tribunal notes that this plea of the complainant concerning future performance-based pay increases was only raised in his rejoinder and accordingly could only be addressed by the Global Fund in its pleas in its surrejoinder to which there would not be, at least in the ordinary course, a rebutting argument by the complainant. While a complainant can add to her or his pleas in a rejoinder (but not add additional claims: see, for example, Judgment 2965, consideration 11), she or he runs the risk, as illustrated by this case, that a detailed and persuasive answer by a defendant organisation emerges in the surrejoinder to which no response is provided by the complainant beyond what had earlier been said in the rejoinder.

11. The case law concerning the Tribunal's consideration of changes to salary structures and grading systems makes clear that the role of the Tribunal is limited and the discretionary power of the organisation to make such changes based on policy or budgetary considerations must ordinarily be respected (see, for example, Judgments 1118, considerations 19 to 20, and 3274, consideration 10). It is difficult to

discern with any precision why the introduction of the new salary arrangements is said by the complainant to have been unlawful. Nonetheless, reference is made to the Noblemaire principle and to the requirement, illustrated in Judgment 1912 cited by the complainant, that methodologies adopted by international organisations for setting and adjusting the remuneration of staff must enable results to be obtained that are stable, foreseeable and clearly understood. The complainant also refers to Judgment 1821 which summarised applicable principles. At consideration 7 of Judgment 1821 the Tribunal said that “the principles governing the limits on the discretion of international organisations to set adjustments in staff pay [...] may be concisely stated as follows: (a) An international organisation is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all other principles of international civil service law [...]. (b) The chosen methodology must ensure that the results are ‘stable, foreseeable and clearly understood’ [...]. (c) Where the methodology refers to an external standard but grants discretion to the governing body to depart from that standard, the organisation has a duty to state proper reasons for such departure [...]. (d) While the necessity of saving money may be one valid factor to be considered in adjusting salaries provided the method adopted is objective, stable and foreseeable [...], the mere desire to save money at the staff’s expense is not by itself a valid reason for departing from an established standard of reference [...].”

12. The Tribunal discussed the essential elements of the Noblemaire principle in Judgment 825, consideration 1. The Tribunal there observed that the Noblemaire principle, which dates back to the days of the League of Nations and which the system of the United Nations took over, embodies two rules. One is that, to keep the international civil service as one, its employees shall get equal pay for work of equal value, whatever their nationality or the salaries earned in their own country. The other rule is that in recruiting staff from all Member States, international organisations shall offer pay that will draw and keep citizens of countries where salaries are highest. However it is a principle that generally has been applied to organisations which participate in the

United Nations common system. That it should be applied to those organisations is not controversial. The issue that ordinarily arises in proceedings in the Tribunal is whether it has been applied correctly. However, the Global Fund is not part of the United Nations common system. Indeed in its surrejoinder, the Global Fund points to the normative legal documents that establish the basis on which it determines and maintains grading and salary structures. Those provisions appear to be unexceptionable. It cannot be assumed, as the complainant seems to suggest, that the Noblemaire principle should be grafted on to those legal arrangements notwithstanding that the Global Fund is not part of the common system. The Tribunal rejects the suggestion it should be.

13. The complainant's argument concerning the Noblemaire principle contained some subsidiary arguments about the process leading to the new salary structure and grading system including that arbitrary figures were used, there was a failure to redress an imbalance in the margins at individual grades, and disparate benchmarks were used when determining salaries at particular levels. But these are matters of evaluation and assessment. Broadly similar arguments were raised in the proceedings leading to Judgment 3360. In issue in that matter was whether or not it was correct to apply the particular survey results and consequent post adjustment index to the complainants' salaries. However the Tribunal observed in relation to the arguments advanced by the complainants in those proceedings, that they raised issues of a very technical nature and similar considerations applied as in Judgment 3273, under 6, where the Tribunal noted that "an evaluation or classification exercise is based on the technical judgement to be made by those whose training and experience equip them for that task. It is subject to only limited review. The Tribunal cannot, in particular, substitute its own assessment for that of the organisation. Such a decision cannot be set aside unless it was taken without authority, shows some formal or procedural flaw or a mistake of fact or of law, overlooks some material fact, draws clearly mistaken conclusions from the facts or is an abuse of authority (see, for example, Judgment 2581)."

14. In the present case the Tribunal is not satisfied that there was any illegality attending the development and adoption of the new salary structure and grading system. Accordingly, the complaint should be dismissed as partly irreceivable and partly unfounded.

15. Several other staff members sought to intervene in these proceedings. However, as the complaint will be dismissed, the applications to intervene will also be dismissed (see Judgment 3427, consideration 38).

DECISION

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment, adopted on 6 November 2017, Mr Giuseppe Barbagallo, 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 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ