R. M. (No. 2)

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

125th Session **Judgment No. 3924**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr M. R. M. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter "the Global Fund") on 17 September 2015, the Global Fund's reply of 17 February 2016, the complainant's rejoinder of 20 June, corrected on 21 June, and the Global Fund's surrejoinder of 1 November 2016;

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 modification of the rate of the expatriate premium paid to him.

The Global Fund was established in 2002 as a financing mechanism to mobilise and disburse funds to fight HIV/AIDS, tuberculosis and malaria.

The Global Fund concluded an Administrative Services Agreement with the World Health Organization (WHO) pursuant to which a range of administrative services were supplied by WHO, including human resources services. Hence staff members hired to work for the Global Fund were employed by WHO in accordance with WHO's Staff

Regulations and assigned to the Global Fund's projects. On 31 December 2008 the Global Fund and WHO terminated the Agreement. Consequently the employment of WHO staff members assigned to the Global Fund's projects was terminated, but they were simultaneously offered contracts of employment on 1 January 2009 directly with the Global Fund, which became an autonomous organisation.

Concerning the expatriate premium which is at stake in this complaint, Article 3.3.3 of Part 3 of Annex 1 to the Human Resources Policy Framework provides that the Global Fund will have a single expatriate benefit – the expatriate premium – that will replace the following allowances that were included in the WHO benefits package: home leave travel, education grant travel, rental subsidy and family visit travel. The expatriate premium is calculated as a percentage of the annual salary, with applicable rates provided in the Policy Framework. The rate is determined at a certain level for the first six years of continuous service with the Global Fund and then diminished from the seventh to the tenth year of employment. The expatriate premium is phased out entirely from the eleventh year of employment onwards. Article 3.3.3 further provides that the expatriate premium shall provide an allowances and benefits package that ensures most employees will receive allowances that are equivalent or better than those received when working for WHO. It also provides that the "grandfathering" principle will apply to those who are disadvantaged by the new arrangements. The grandfathering may be for a time-limited period or for the remaining period for which the employee is engaged by the Global Fund.

In November 2008 the complainant, who had joined the Global Fund in 2006, signed an agreement for his transfer from WHO to the Global Fund with effect from 1 January 2009. At the same time he signed an employment contract of continuing duration with the Global Fund as a Finance Analyst at grade 3. It was stated therein that he was an expatriate and that in accordance with the Global Fund Rules for Grandfathering of WHO Benefits/Allowances and Mapping Employees Across from Current WHO Salary to Global Fund Salary, he would

receive compensation to ensure that the overall value of the benefits and allowances he enjoyed as a WHO staff member was retained.

In November 2014 the Head of the Human Resources Department (HRD) informed the complainant that, as from 1 January 2015, he would be in his seventh year of employment with the Global Fund and that the rate of his expatriate premium would be reduced.

On 21 April 2015 the complainant filed a Request for Resolution with HRD, objecting to the reduction of his expatriate premium as shown on his payslip of 23 January. In his view, the Global Fund had violated the grandfathering principle. He therefore asked to be reimbursed in respect of the reduction applied since January 2015 and that the reduction not be applied to his salary until the end of his contract. He also asked that salary increases other than those relating to performance be applied with retroactive effect.

On 19 June 2015 the Acting Head of HRD wrote to the complainant indicating that a number of staff in the same situation as his had submitted similar Requests for Resolution and that his response addressed all submissions made by former WHO employees. Concerning salary increases, he did not find any evidence that a promise had been made when the complainant was placed under the employ of the Global Fund to the effect that his salary would constantly increase. The compensation and benefits regulations in force as of 1 January 2009 provided that salary increases were not automatic but were based on market movement, key performance indicators and performance. The complainant's request therefore could not be granted, and progressive reductions in expatriate premiums after six years of employment with the Global Fund would continue to apply in accordance with the Employee Handbook. The Head of HRD stated that the complainant had the right to submit an appeal to the Appeal Board in accordance with applicable rules.

On 21 July 2015 the complainant sought clarification with the Coordinator of the Office of the Appeal Board as to whether matters concerning reduction of expatriate premium were within the "jurisdiction/mandate" of the Appeal Board. The Coordinator replied on 13 August that "it [was] out of the scope of the Appeal Board to

deliberate on the rules applying to the reduction of the expatriate premium", the Appeal Board had no mandate or authority to set or change policy, benefits or rules. She stated that with respect to "the grandfathering clause applying to [his] contract and to the promised performance based salary increase, the issue could be appealable at the Appeal Board as it might have affected [his] condition of employment". She added that, in the absence of a formal Request for Appeal and further details, she could not confirm that such grievance would be considered receivable by the Appeal Board.

On 17 September 2015 the complainant filed a complaint with the Tribunal impugning the decision of 19 June.

The complainant asks the Tribunal to set aside the impugned decision and to order the Global Fund to reimburse him all expatriate premium reductions applied since January 2015. He also asks the Tribunal to order the Global Fund to pay all the lost salary and benefits he should have received had he remained in the employ of WHO, and to order the Global Fund to ensure, as it had committed to do, that his overall salary and allowances are as good as or better than the salary and allowances he received while employed by WHO. He further requests the Tribunal to order the Global Fund to respect "the letter and the spirit" of the grandfathering principle when it adopts a policy or makes a decision that affects his salary and allowances. He claims 5,000 Swiss francs in moral damages plus costs.

The Global Fund asks the Tribunal to dismiss the complaint as irreceivable for failure to exhaust internal means of redress, and without merit.

CONSIDERATIONS

1. The complainant is employed by the Global Fund as a Finance Analyst. On 17 September 2015 he filed a complaint with the Tribunal impugning, in terms, a decision of 19 June 2015. The impugned decision was constituted by an email and an attached letter of that date from the Acting Head of HRD responding to a Request for Resolution submitted by the complainant on 21 April 2015.

2. The Global Fund challenges the receivability of the complaint. It is convenient to deal with this issue at the outset. It is unnecessary to detail the circumstances in which the Request for Resolution was submitted nor to detail the subject matter of the request. Suffice it to note that the complainant was challenging the reduction of an expatriate premium (in character, an allowance) which he had earlier been paid for several years following the transfer of his employment from WHO in late 2008, effective 1 January 2009, to direct employment with the Global Fund.

3. The receivability is challenged on two related bases. The Global Fund argues that the decision of 19 June 2015 does not constitute a final decision and the complainant has not exhausted internal means of resisting it under the applicable Staff Regulations. Those means involve any internal appeal to the Appeal Board. Accordingly, on the organisation's argument, Article VII, paragraph 1, of the Tribunal's Statute applies rendering the complaint irreceivable.

4. The complainant's answer to this argument in his rejoinder is that the decision of 19 June 2015 was a final decision in circumstances where he had sought, on 21 July 2015, the advice of the Office of the Appeal Board as to whether that decision could be appealed internally, and that he was advised, as he understood the advice, that the Board took the view it had no mandate or jurisdiction to adjudicate on the subject matter of the complainant's grievance.

5. It is tolerably clear from the complainant's Request for Resolution of 21 April 2015 that he was disputing the reduction of the expatriate premium on the basis that the reduction was inconsistent with the grandfathering principle applicable to his contract. The remedy he sought was the reimbursement of the reduction which had applied since January 2015, that the reduction not apply to his salary until the end of his contract and that salary increases (other than for performance) be applied with retroactive effect to, it appears, the expatriate premium to which he considered he was entitled.

6. In his email to the Coordinator of the Office of the Appeal Board of 21 July 2015, the complainant sought to have clarified "if matters concerning reduction on Expat Premium, which affected our benefits [were] within the jurisdiction/mandate of the Office of the Appeal Board". The complainant then set out the circumstances or context in which that clarification was sought which were that he had submitted a "formal appeal for resolution" concerning the reduction "on Expat Premium" and that the organisation had not complied with its formal commitment that the level of revenue would be "at least as good as if we were in WHO". The complainant said he considered, effectively, this commitment as being "the condition sine qua non to the application of the reduction of expat premium after 6 years". He also complained that the response he had received from the Head of HRD was a generic response that had not addressed specific arguments he had raised.

7. The gravamen of the complainant's grievance, as identified in the email of 21 July 2015, was the application to him of the arrangements that had been put in place at the time of the transfer of his employment and the employment of others from WHO to direct employment with the Global Fund.

8. The response of the Coordinator of the Office of the Appeal Board firstly noted that the reduction in expatriate premium was "ruled by Annex VIII, Article 7 of the Employee Handbook" and she then noted that the "Appeal Board has no mandate or authority to set or change policy, benefits or rules". However the Coordinator went on to say "[w]ith respect to the grandfathering clause applying to your contract and to the promised performance based salary increase, the issue could be appealable at the Appeal Board as it might have affected your condition of employment". The Coordinator then observed that "in [the] absence of formal Request for Appeal and further details, [she could not] confirm that such grievance would be considered receivable by the Appeal Board".

9. Viewed reasonably and objectively, this response should have been understood by the complainant as saying that his grievance concerning the application of the grandfathering arrangements to his

circumstances could be the subject of appeal. What he was being told about the limits of the jurisdiction of the Appeal Board was simply that he could not challenge the terms of those arrangements or the policy underlying them. However his grievance was not of that character and, as just noted, concerned the application (and potentially the interpretation) of those arrangements. Thus the complainant was being told he could pursue an appeal against any decision embodied in the email and the attached letter of 19 June 2015. This he failed to do.

10. In the result the complaint is irreceivable because the complainant has not exhausted internal means of resisting any decision embodied in the email and the attached letter of 19 June 2015.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 31 October 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