D.

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

127th Session **Judgment No. 4073**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms N. B. D. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter "the Global Fund") on 12 July 2016 and corrected on 11 October 2016, the Global Fund's reply of 20 February 2017, the complainant's rejoinder of 3 April and the Global Fund's surrejoinder of 4 July 2017;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

Considering that the facts of the case may be summed up as follows:

The complainant contests the reduction of the rate of the expatriate premium paid to her.

The Global Fund was established in January 2002 as a financing mechanism to mobilise and disburse funds to fight HIV/AIDS, tuberculosis and malaria. Pursuant to an Administrative Services Agreement concluded with the World Health Organization (WHO) in May 2002, Global Fund employees were employed by WHO and assigned to Global Fund projects, while their employment was governed by WHO's Staff Regulations and Staff Rules. When the Administrative Services Agreement was brought to an end on 31 December 2008, the Global Fund became an autonomous organization and its staff were offered, with effect from 1 January 2009,

contracts of employment directly with the Global Fund, in accordance with the Global Fund Human Resources Policy Framework.

As regards the expatriate premium, Part 3, paragraph 3.3.3, of Annex 1 to the Human Resources Policy Framework provides that the Global Fund shall have a single expatriate benefit – the expatriate premium – that shall replace the following allowances previously 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 Human Resources Policy Framework. The rate is determined at a certain level for the first six years of continuous service with the Global Fund and then reduced from the seventh to the tenth year of employment. The expatriate premium is phased out entirely from the eleventh year of employment onwards. Paragraph 3.3.3 further provides that the expatriate premium shall provide an allowances and benefits package that ensures that most employees will receive allowances that are equivalent or better than those they received when working for WHO. It also provides that the "grandfathering" principle, whereby those employed as at 31 December 2008 may, where necessary, be guaranteed certain conditions of employment from which they benefited as WHO employees, will apply to those who are disadvantaged by the new arrangements. Grandfathering may be for a time-limited period or for the remaining period for which the employee is engaged by the Global Fund.

The complainant joined the Global Fund under a WHO contract of employment in July 2004. In November 2008 she signed a Global Fund contract of continuing duration which took effect on 1 January 2009. That contract specified, inter alia, that the terms of reference of the complainant's position in the Global Fund would remain the same as those corresponding to the position she held under her most recent contract of employment with WHO 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, she would receive compensation to ensure that the overall value of the benefits and allowances she enjoyed as a WHO staff member was retained. The contract, nevertheless, also specified that she

was entitled to receive benefits and allowances in accordance with the Global Fund Human Resources Policies, Regulations and Procedures, specifically the Human Resources Policy Framework and the Compensation and Benefits Regulation.

On 6 November 2014 the Human Resources Department (HRD) informed the complainant that for the next four years starting on 1 January 2015, the date marking the beginning of her seventh year of continuous employment with the Global Fund, a reduced rate would be applied in the calculation of her expatriate premium. On 19 May 2015 the complainant and other employees, acting individually and as Staff Council representatives, submitted Requests for Resolution challenging the reduction of the expatriate premium and requesting, in the main, that it be maintained at 100 per cent for the entire duration of their employment with the Global Fund or, alternatively, that the reduction of the expatriate premium start six years after the introduction of the performance-based salary increases, i.e. on 1 January 2020. These Requests for Resolution were rejected by HRD on 19 June 2015 and the complainant along with the other employees, again acting individually and as Staff Council representatives, lodged appeals in August 2015. The Appeal Board joined these appeals in a single appeal and, in its report of 30 March 2016, recommended that the appeal be dismissed, mainly on the ground that the complainant – as well as the other appellants – should have contested the reduction and eventual abolition of the expatriate premium at the end of 2008, in the period leading up to the implementation of the new expatriate premium. The Executive Director endorsed that recommendation and the complainant was relevantly informed by a letter of 14 April 2016. That is the decision she impugns before the Tribunal, both in her individual capacity and her capacity as a Staff Council representative.

She asks the Tribunal to set aside the Executive Director's decision dated 14 April 2016 as well as HRD's earlier decision dated 6 November 2014, and to order that her expatriate premium be maintained at 100 per cent for the entire duration of her employment with the Global Fund. In the event that the decision to apply the reduced rate over a period of four years is maintained, she asks that the payment of the expatriate

premium at the reduced rate start at the earliest six years after the introduction of the performance-based salary increases, i.e. on 1 January 2020. She seeks recognition of the discriminatory effect of the contested decision on employees, such as herself, who have been with the Global Fund for a longer period of time and have not benefited from performance-based salary increases before 1 January 2014 but have, nonetheless, received as from 1 January 2015 expatriate premiums calculated at a reduced rate. She also claims costs.

The Global Fund asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant was a WHO official assigned to the Global Fund Secretariat. She remained with the Global Fund when it separated from WHO on 31 December 2008. Prior to the separation, as WHO officials, Global Fund staff were entitled to the following benefits, among others: home leave travel; education grant travel; rental subsidy; and family visit travel. After the Global Fund's separation from WHO, these benefits were replaced by a single one: the expatriate premium. During the transition period prior to the Global Fund's separation from WHO, Global Fund staff were informed that their entitlement to this benefit would be time-limited, as it would be subjected to a reduction from the seventh to the tenth year of their employment with the Global Fund after the Fund's separation from WHO and that it would be completely abolished from the eleventh year onwards. The complainant and others, individually and as Staff Council representatives, officially raised concerns about this in an email to the Director of HRD on 10 January 2014, but the terms of the expatriate premium were confirmed with the reductions to commence on 1 January 2015. They sought to have the matter resolved informally but that process failed and on 19 May 2015 they submitted, individually and as Staff Council representatives, Requests for Resolution. The complainant and the other staff members lodged their appeals in August 2015 after their Requests for Resolution were denied on 19 June 2015. The Appeal Board joined the appeals and

issued a single report on 30 March 2016. The Executive Director, accepting the Appeal Board's recommendation, dismissed the appeal in the impugned decision dated 14 April 2016.

2. In her Request for Resolution, the complainant stated the scope of her challenge as follows:

> "This Request for Resolution concerns the decision to start reducing Expatriate Premiums, six (6) years after the benefit was introduced [...] on 1 January 2009 as the Global Fund 'transitioned' out of WHO. Six years after introduction is 1 January 2015. The first reductions were implemented for individuals with the payroll run end-January 2015."

The complainant stated the reasons for her Request for Resolution as follows:

> "I would like to challenge the reduction of the amount of the Expatriate Premiums paid as of 1 January 2015 because:
>
> i) It is not consistent with the 'grandfathering clause' included in Article 6(b) of my Global Fund Employment contract;
>
> ii) It is a breach of the 'promise' of a package of allowances and benefits that was presented to Global Fund staff during the 'transition period', i.e. from early 2008, as senior management led the [Administrative Services Agreement] Transition Project to 'transition' the Global Fund out of its [Administrative Services] Agreement [...] with WHO;
>
> iii) As a result of ii), there is discrimination in implementing the performance-based salary increases as well as a breach of the principle of equality of treatment, and;
>
> iv) As a result of ii) there is also a violation of acquired rights and the principle of non-retroactivity."

These are the grounds which were before the Appeal Board.

3. The complainant maintains that the subject of the challenge is the decision to reduce the payments of the expatriate premium with effect from 1 January 2015. The complainant's first expatriate premium reduction appeared on her payslip of 23 January 2015. She bases her complaint essentially on two grounds, breach of commitment (breach of promise) and discrimination, as follows:

(1) "The organization breaches a promise of a fair treatment as an employee under the 'grandfathering clause' [which] promise was

substantive [and the non-fulfilment of which] created a financial prejudice."

(2) "The application of the administrative decision to reduce [the] expatriate premium as of January 2015 for former WHO staff without proper compensation has created discrimination between Global Fund staff."

These are similar to grounds (i), (ii) and (iii) of the Request for Resolution.

4. The Global Fund raises irreceivability as a threshold issue. It contends, in effect, that the complainant ultimately challenges the policy that underlies the transitional provisions concerning the expatriate premium, the "grandfathering clause" and other benefits which crystalized at the time of the separation on 31 December 2008. It submits that, accordingly, the challenge was time-barred as the complainant should have submitted her Request for Resolution within three months from that date and, additionally, that matters of policy are not within the Tribunal's competence. It is however clear that the complainant essentially challenges the decision to reduce the expatriate premium as it affected her on 23 January 2015, when the reduction first appeared on her payslip. She is entitled to challenge this in her personal capacity.

5. As to the Global Fund's argument that the complainant's challenge was time-barred, the Tribunal observes that the Global Fund rules on dispute resolution were at the material time contained in Annex X to the Employee Handbook, entitled "Grievance and Dispute Resolution", in the version applicable as of August 2012 (amended in 2014). Annex X states that employees shall raise their concerns or grievances as soon as they arise but not later than three months after the incident giving rise to the grievance has taken place (informal resolution process). Section 3 of the Grievance and Dispute Resolution Process requires that a Request for Resolution (the start of the formal resolution process) be lodged no later than 90 days after: (i) the employee was notified of the decision giving rise to the Request for Resolution; (ii) the employee became aware of the action or omission of the Global

Fund Management giving rise to the Request for Resolution. Section 4 of the Grievance and Dispute Resolution Process provides that an employee who is not satisfied with the response to her/his Request for Resolution may submit an appeal to the Appeal Board no later than 60 days after receipt of the response to her/his Request for Resolution.

6. Considering the chronology of the events set out above, it is clear that the complainant's challenge was not time-barred, as the evidence shows that she complied with procedural time limits. She had sought an informal resolution and when that failed she filed her Request for Resolution on 19 May 2015, i.e. within the four-week extension of the 90-day time limit which HRD had granted her (counting from 23 January 2015, the date of the contested decision). She then lodged her appeal within the 60-day time limit from 19 June 2015 when her Request for Resolution was rejected. The complaint is receivable.

7. The complaint is unfounded on the merits. Paragraph 1 of the employment contract which the complainant signed with the Global Fund on 21 November 2008 states as follows:

> "1. General
>
> The terms and conditions of employment of the Employee by the Global Fund are set out in the following documents:
>
> i. This contract signed by both the Global Fund and the Employee;
>
> ii. The Global Fund Human Resources Policies, Regulations and Procedures, as amended from time to time; and
>
> iii. To the extent that it relates to the employment by the Global Fund of the Employee, the agreement between the World Health Organization ('WHO'), the Global Fund and the Employee regarding the transfer of the Employee from WHO to the Global Fund (the 'Transfer Agreement')."

Paragraph 6, sub-paragraphs a and b, of the same employment contract relevantly state as follows:

> "6. Benefits and Allowances
>
> a. The Employee shall be entitled to receive benefits and allowances in accordance with the Global Fund Human Resources Policies, Regulations and Procedures, specifically the Human Resources

> Polic[y] Framework (GF/EDP/08/16) and the Compensation and Benefits Regulation.
>
> b. 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, the Employee will receive compensation to ensure that the overall value of the benefits and allowances she/he enjoyed as a WHO staff member is retained."

8. The complainant states in her brief that she felt under duress to sign the aforementioned contract within the three days that she was required to do so. She states that it was only when she received that contract that she read for the first time that she was to receive the expatriate premium and that it was regulated by the expatriate premium policy which, nevertheless, did not exist at the time. It is however noted, first, that the complainant has not elaborated duress as a plea for the purpose of voiding the contract, and, in any event her statements do not amount to duress for that purpose. In the second place, she was well aware at the time of signing that contract what the expatriate premium was, as it would be applied to her. HRD had made a number of presentations, which were led by the Executive Director, to staff concerning the Human Resources Policy Framework prior to its approval by the Global Fund Board. The complainant admits this and states that as a staff member attending those sessions, she understood that there would be changes to the benefits, but that her overall package of rights and benefits would have remained at a minimum as it was. Moreover, the Human Resources Policy Framework (GF/EDP/08/16) was approved by the Global Fund Board prior to the date on which the complainant signed her contract but it was to come into effect on 1 January 2015. In the third place, the "grandfathering" clause upon which the complainant relies in her submissions is a provision of the Human Resources Policy Framework.

9. Part 2, paragraph 9, of the Human Resources Policy Framework summarizes the Framework's overarching principles. It relevantly states, in effect, that notwithstanding that the separation of the Global Fund from WHO should lead to no or limited increases in the operating expenses for the Global Fund, the Board decided that current employees

would not be disadvantaged by the separation and that, where appropriate, "grandfathering" principles and policies would be established; that the Global Fund would adopt a "one-staff principle" by removing the differentiation between General Service and Professional grades in order to improve equality across the workforce, facilitate career development and improve transparency and simplicity of allowances. The summary of compensation and benefits, which is contained in Part 3, states in paragraph 2, among other things, that as understood by the "one-staff principle" the Global Fund aims to simplify the provision of compensation and benefits and reduce administrative costs. Part 3, paragraph 3, states that "current staff will be 'mapped' across on the new salary scales at the current level of earnings" and that "[f]urther movement on the new salary scales, and hence cost, will be controlled by the Board through the approval of the new salary administration and performance pay policies to be submitted to the Board in April 2009, and thereafter through the annual budget approval process". Article V(1) in paragraph 1.2 of Part 1 of Annex 1 to the Human Resources Policy Framework states that the Global Fund "shall have a competitive salary and allowances structure for all employees which shall be reviewed on a regular basis".

10. Part 3 of Annex 1, which deals with allowances, lists a number of existing WHO allowances which were to be discontinued by the Global Fund and allowances which were to remain the same and those which were to be reshaped. Part 3, paragraph 3.3.3, introduced the expatriate premium that replaced the four allowances mentioned earlier in consideration 1 of this judgment. It further states that the allowance "will be capped at [...] 20% [of salary per annum] for employees originating from [countries outside the European Union and the European Economic Area]". It provided a "grandfathering" principle for employees who transitioned from WHO. This principle states that in instances where such employees were disadvantaged by the new benefits and allowances package they "may where necessary, be guaranteed certain conditions of employment for which they were eligible as WHO employees; in order that the employee [...] retains the value of entitlements to which he or she was entitled under the pre-existing conditions". It further states that "'[g]randfathering' may be for a time-

limited period or for the remaining period for which the employee is engaged by the organization" and that "[t]he type of benefit is a factor in determining which will be appropriate".

11. Except for the statement, the complainant has provided no evidence to prove that by reducing the expatriate premium she received from January 2015 onwards, the Global Fund breached its commitment to her under the "grandfathering" clause or how the reduction "created a financial prejudice" to her by reference to the overall value of the benefits and allowances she received as a WHO staff member. In other words, she has not explained how the reduction of the expatriate premium as from January 2015 breached her guaranteed retention of the total value of the benefits and allowances to which she was entitled under the pre-existing conditions as a WHO staff member. She merely provides figures which purport to show her financial losses for family visit travel, and a reduction of 155.40 Swiss francs in the amount she received in her January 2015 payslip compared to her December 2014 payslip. She does not show how that reduction "created a financial prejudice" to her by reference to the value of the benefits and allowances to which she was entitled prior to January 2009. Neither has she provided evidence which proves that the reduction in the expatriate premiums she received from 1 January 2015 onwards created discrimination or inequality between herself and other Global Fund staff, as she contends, in circumstances in which she was in a like situation to other staff members but was treated differently (see Judgment 3298, under 21).

12. In the foregoing premises, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ