

G.

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

135th Session

Judgment No. 4589

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms K. G. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter “the Global Fund”) on 13 May 2019 and corrected on 21 May, the reply of the Global Fund of 14 August 2019, the complainant’s rejoinder of 2 December 2019 and the Global Fund’s surrejoinder of 6 March 2020;

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

Having examined the written submissions;

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

The complainant contests the recruitment process for the position of Staff Council Coordinator and her non-selection for that position.

On 13 September 2016 the complainant was appointed to the position of Staff Council Coordinator, at grade level B, under a six-month temporary contract of employment. She was subsequently offered two consecutive contract extensions, the second expiring on 31 January 2018.

In autumn 2017 the Global Fund issued a vacancy notice for the position of Staff Council Coordinator to be filled under an open (indefinite) contract. The complainant, who was at the time assigned to said position under a temporary contract, applied for the vacancy and was one of the three applicants shortlisted for a final interview with the

Selection Panel. The interviews took place on 7 December 2017. On 18 December 2017 the Chair of the Staff Council, the complainant's line manager, orally informed the complainant that she had not been selected for the position.

On 19 December 2017 the complainant went on annual leave and soon after she noticed that her access to her employee account and email were blocked. Upon her return to the office, she contacted the IT Department and they were able to unblock both her employee account and email. The explanation offered was that her employee account and email had been blocked due to concerns expressed by her line manager about security and confidentiality issues that might affect the Staff Council Office.

Further to her request, the complainant received on 17 January 2018 a copy of the Selection Panel Conclusion.

On 25 January 2018, while she was on sick leave, the complainant's employee account and email were once again blocked at the request of her line manager.

On 31 January 2018 the complainant's contract expired and she separated from the Global Fund.

Between 15 February and 20 March 2018 she submitted to the Head, Human Resources Department (HRD) three requests for resolution in which she respectively contested the recruitment process for the position of Staff Council Coordinator and the Administration's failure to issue her a detailed leave statement and an acceptable and appropriate Certificate of Service. By a letter of 13 April 2018, the Head, HRD, provided a consolidated response to the complainant's three requests for resolution, rejecting the complainant's assertions regarding the recruitment process as well as the entirety of her requests for damages and costs. Noting that a standard attestation of employment had already been sent to the complainant, the Head, HRD, sent to the complainant, along with the 13 April letter, a detailed leave statement and an attestation confirming her employment as Staff Council Coordinator, supplemented by the job description for the position. On 5 June 2018 the complainant submitted an appeal to the Appeal Board challenging the decision of 13 April 2018 by the Head, HRD.

On 8 and 9 October 2018 she requested the full disclosure of the “competition file” of the recruitment process. Further to reviewing this request, the Coordinator, Office of the Appeal Board, informed the complainant by memorandum of 10 January 2019 that the Appeal Board had rejected her request noting that, insofar as the complainant had been provided on 17 January 2018 with a copy of the Selection Panel Conclusion, including its recommendations, she had been given access to the evidence on which the decision not to select her had been made. On 22 January 2019 the complainant replied that the Appeal Board’s refusal to disclose the requested documents rendered her unable to submit a supplement to her appeal regarding, in particular, (i) what she considered to be defamatory statements by the Selection Panel and (ii) whether the selected candidate fulfilled the fundamental requirements of the vacancy notice for the position of Staff Council Coordinator. In its report of 14 February 2019, the Appeal Board recommended that the appeal be rejected. By a letter of 20 February 2019, the Executive Director informed the complainant that he had decided to endorse the Appeal Board’s recommendation and to reject her appeal as unfounded. This is the impugned decision.

The complainant asks the Tribunal to order the Global Fund to set aside and reassess the selection process results; award her moral damages in the amount of 50,000 euros; award her the full amount of the costs she incurred in bringing these proceedings; award her interest at the rate of 5 per cent per annum on all sums granted until the date all such sums are paid in full; award her such other relief as the Tribunal deems necessary, just and fair.

The Global Fund asks the Tribunal to reject the complaint and all ancillary claims as devoid of merit.

CONSIDERATIONS

1. On 5 June 2018 the complainant lodged an appeal to the Appeal Board contesting the 13 April 2018 decision by the Head, HRD, which rejected her requests for resolution. The complainant had requested, in the main, the cancellation of the recruitment process for

the position of Staff Council Coordinator, in which she was one of the short-listed candidates and the conduct of a new recruitment process, in which she should be considered as a candidate. She had also requested consequential relief. In its 14 February 2019 report to the Executive Director, the Appeal Board recommended that the complainant's internal appeal be rejected on its merits. The complainant contests the Executive Director's acceptance of this recommendation in the impugned decision.

2. As a precursor to determining the merits of this complaint, one procedural matter concerning the complainant's request for disclosure will be addressed. This will be done by reference to the Tribunal's case law stated, for example, in consideration 5 of Judgment 4023 according to which, a staff member must, as a general rule, have access to all evidence on which the authority bases or intends to base its decision against her or him, and, under normal circumstances, such evidence cannot be withheld on grounds of confidentiality. It follows that a decision cannot be based on a material document that has been withheld from the concerned staff member. The Tribunal has consistently affirmed the confidentiality of the records of the discussions regarding the merits of the applicants for a post. However, this does not extend to the reports regarding the results of the selection process with appropriate redactions to ensure the confidentiality of third parties.

3. The complainant repeats her request, made in the internal appeal procedure, that the Global Fund be ordered to disclose a redacted copy of the full competition file of the recruitment process. In its 14 February 2019 report to the Executive Director, referring to the Tribunal's case law, the Appeal Board stated that it had rejected the complainant's request for disclosure. This was on the basis that the complainant had been given access to the evidence on which the contested decision was based, as the Global Fund had already provided her with a redacted copy of the Selection Panel's report, which included its recommendations. As the Appeal Board concluded, correctly by reference to consideration 11 of Judgment 3032, the full disclosure to the complainant of the competition file of the sixty-six candidates who had

applied for the contested post would breach the right of confidentiality of third parties. The complainant's request for disclosure is rejected.

4. A convenient starting point in the Tribunal's consideration of the merits of this complaint is to identify the general applicable principles. Consistent case law, stated for example in Judgments 4001, consideration 4, and 4467, consideration 2, has it that a person who challenges the selection of a candidate for a post must demonstrate that there was a serious defect in the selection process. As the selection of candidates is necessarily based on merit and requires a high degree of judgement on the part of those involved in the selection process, a complainant must demonstrate that there was a serious defect in the selection process which impacted on the consideration and assessment of her or his candidature. It is not enough simply to assert that one is better qualified than the selected candidate. However, when an organisation conducts a competition to fill a post the process must comply with the relevant rules and the Tribunal's case law. When an organisation wants to fill a post by competition it must comply with the material rules and the general precepts of the case law, as the purpose of competition is to let everyone who wants a post compete for it equally. The Tribunal's case law therefore demands scrupulous compliance with the rules announced beforehand.

5. The complainant challenges the impugned decision on the following grounds:

- (i) The Appeal Board made mistakes of fact and law and drew erroneous conclusions in its report to the Executive Director;
- (ii) In breach of the *patere legem* principle, there was a failure to provide her with feedback and a failure to discharge the duty to substantiate a decision, as required by the Employee Handbook, by particular reference to Section 7 of the Human Resources (HR) Practice Note on Recruitment and Selection and the Tribunal's case law, vitiating the original and impugned decisions;
- (iii) The Selection Panel report contains mistaken conclusions, biased findings and defamatory statements; and

- (iv) Actions by the Global Fund following her non-selection violated her (the complainant's) dignity as an international civil servant and constituted failure by the Global Fund to discharge its duty of care towards her.

6. Regarding ground (i), the complainant submits, by reference to consideration 12 of Judgment 3125, that the Appeal Board committed an error of law by unlawfully restricting its competence while examining her internal appeal. The Tribunal stated, in the referenced consideration, that the internal appeal body involved in that case was wrong to define its own competence by reference to the case law which defines the Tribunal's own power of review of discretionary decisions. In consideration 14 of Judgment 3125, the Tribunal set aside the selection process solely because the internal appeal body had so restricted its competence. That however is not the end of the matter. The Tribunal's case law also has it that where an organization's rules restrict an appeal body's power to review a discretionary decision, the rules, rather than the foregoing principle, apply (see, for example, Judgment 3077, consideration 3).

7. Importantly for the purpose of this case, however, the case law further has it that, notwithstanding that an Appeal Board wrongfully defines its competence to review a selection decision by reference to the Tribunal's limited power of review, the report of the Board would not be vitiated if it is found that it in fact considered the submissions and materials the parties provided (see, for example, Judgment 4010, consideration 7). Accordingly, in consideration 2 of Judgment 3590, the Tribunal stated that by noting that the candidates had been treated equally, the Appeal Board recognized that the appointing authority enjoyed wide discretion to appoint the person whom it considered to be the most qualified for the post advertised from a shortlist of candidates, all of whom met the requirements specified by the vacancy notice. The Tribunal also stated that this self-restraint on the part of the appeal body is completely justified to the extent that, when conducted correctly, a competition and selection procedure calls for a complex assessment of multiple criteria that relate as much to the candidates' personalities and

qualities as to the organization's particular interests. It further stated that without compromising the objective assessment of these criteria, the appeal body cannot be vested in every circumstance with the same power of review that must be granted to the bodies responsible for selecting candidates, but that this does not relieve the appeal body of its duty to examine the competition file closely and to provide plausible reasons for its recommendation within the limits of its power of review.

8. In the present case, the Appeal Board examined the competition file, although it did not disclose it to the complainant. The complainant and the selected candidate had both passed the screening stage and were shortlisted for the interview process. Accordingly, as the Global Fund submits, the Selection Panel based its assessment on objective and fair criteria regarding competencies and did not form its opinion based on specific skills but, more broadly, on an overall suitability for the role. The complainant's submission that the selected candidate did not meet the desired qualifications in the vacancy notice, while she (the complainant) fulfilled all the desired qualifications, does not advance her case any further. Under the Tribunal's case law, the absence of a desired qualification does not disqualify a candidate from being selected to fill a post (see, for example, Judgment 4467, consideration 13).

9. The report of the Appeal Board shows that the Board fulfilled its mandate in the terms stated in consideration 2 of Judgment 3590, summarized in consideration 7 of this judgment. The Board concluded that there were no flaws in the selection process; that the decision not to select the complainant to fill the contested post was made on objective bases; that the candidates were given equal and fair opportunity during the interview process to show their ability to perform in the position and that in the absence of substantiating evidence the competition was not tainted with bias merely on the complainant's allegation that two members of the Selection Panel were friends. In the Tribunal's view, the Appeal Board fairly considered on the whole the analyses of the Selection Panel from the reports of the interviews, rather than with an emphasis on any one or two work attributes the complainant raises. In the premises, ground (i) is unfounded.

10. Ground (iii), in which the complainant contends that the Selection Panel made mistaken conclusions and biased findings in its report is also unfounded. These allegations are not proved, for example, by the complainant's speculative statement that the Selection Panel appeared to have no knowledge of the work she had carried out under the instructions of the former Chair of the Staff Council or that she was the victim of the Selection Panel's ignorance. Neither is the complainant's statement that the Selection Panel created a particularly negative report, borne out by the Panel's analysis. In fact, the complainant's submissions to support her allegations of mistaken conclusions and biased findings by the Selection Panel reflect her views of the elements she considers to be critical to the outcome of the selection process, rather than the Selection Panel's assessment which, in the Tribunal's view, was fair and balanced.

11. In ground (iii), the complainant also seeks damages for defamatory remarks, allegedly made by the Selection Panel in its report. She submits that for the Selection Panel to have stated that she "demonstrated an intense, activist demeanor" or to brand her, an international civil servant, as an "activist" when she applied for a Staff Council position that ensures the rights and interests of staff and consultants, is defamatory and an affront to her dignity. However, the following is the context in which the criticized words were used in the Selection Panel's report: "[The complainant] demonstrated an intense, activist demeanor that while admirable, was not considered ideal for this role as the coordinator often serves as the front-line listener and empathizer for the Staff Council's multicultural constituents. Taking into account what the Staff Council needs to be successful going forward it was unanimously felt that [the complainant] is not the right candidate for the role at this point in time". This statement in its full context is not defamatory. In the foregoing premises, ground (iii) is unfounded.

12. In ground (iv), the complainant submits, in effect, that the Global Fund violated her dignity as an international civil servant, as well as its duty of care towards her, because it blocked her access to her

employee account and email; her access was blocked on two occasions while she was on annual and sick leave. As well, she submits that the Global Fund did not issue her a Certificate of Service for six weeks after the end of her contract, thereby leaving her in a state of uncertainty and placing her career in jeopardy. As pleaded, this is not a ground for setting aside the impugned decision, cancelling the selection process and/or the selected candidate's appointment.

13. In its report, which the Executive Director accepted in the impugned decision, the Appeal Board stated that the Global Fund could have acted more diligently to avoid blocking the complainant's employee account and email, and deemed the action excessive, while noting the special circumstances which existed at the material time as the Global Fund was preparing to move to new offices. The Appeal Board observed that the Global Fund issued a Certificate of Service to the complainant some six weeks after she separated from the Global Fund. It correctly concluded that the Administration's lack of diligence in providing that document in a timely manner could have hampered her job search but that the complainant had not provided evidence of this. As the complainant has not articulated the injury which she suffered, either as a result of the cancellation of her employee account and email or the Administration's delay in issuing the Certificate of Service, she is not entitled to an award of moral damages on these bases.

14. The essence of ground (ii) is that after the selection process, the Administration did not provide the complainant with the appropriate feedback explaining the reasons why she was not selected to fill the contested post. Section 7 of the HR Practice Note on Recruitment and Selection relevantly states as follows: "Internal candidates who are not successful are, as appropriate, given feedback either by the Hiring Manager or exceptionally by the relevant HR representative".

15. The complainant submits that there was an error of fact and a mistaken conclusion drawn from the facts, because the Appeal Board concluded that she received appropriate feedback on the reasons why she was not selected to fill the post, both from her line manager in a

meeting in December 2017 and from the partial disclosure of the Selection Panel's conclusion. However, as an event that would have been subsequent to the completion of the selection process, contrary to what the complainant seems to suggest, the alleged failure to provide appropriate feedback is no basis for cancelling the selection process. Moreover, the Global Fund would not have thereby failed to substantiate the selection decision, as the complainant suggests by reference to consideration 13 of Judgment 2392. Ground (ii) is therefore unfounded.

16. Since all grounds of the complaint are unfounded, it will be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 20 October 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ