Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

119th Session **Judgment No. 3424**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. P. against the Global Fund to Fight AIDS, Tuberculosis and Malaria on 19 June 2012 and corrected on 18 October 2012, the Global Fund's reply of 22 January 2013, the complainant's rejoinder of 30 April, the Global Fund's surrejoinder of 5 August, the complainant's further submissions of 12 October 2013 and the Global Fund's observations thereon of 20 January 2014;

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 and the pleadings may be summed up as follows:

A. The complainant was recruited by the Global Fund in September 2009, under a permanent contract, as a fund portfolio manager.

At its 25th meeting, held in November 2011, the Global Fund Board approved a consolidated transformation plan to improve the organisation's performance. On 20 March 2012 the complainant was called to a meeting with the Director of the Grant Management Division and a manager from the Human Resources Department (HRD) during which, on account of the restructuring process and ensuing changes in operational priorities, he was offered a separation agreement, dated

19 March, whereby he would be placed on special leave with pay until 30 April 2012, the date on which his contract would end, would receive a termination indemnity and six months' basic salary in lieu of notice and in lieu of reassignment and would waive any right of appeal. He again met the manager of the above-mentioned department the next morning and signed the agreement in question. In response to his request for reinstatement, or a larger indemnity, he was informed by an e-mail of 9 April that the terms of the agreement which he had signed were not renegotiable. On 18 April he sent an e-mail to the General Manager in which he requested a review of this decision. On 19 June 2012 he filed a complaint with the Tribunal.

B. The complainant submits that his complaint is receivable under Article VII, paragraphs 1 and 3, of the Statute of the Tribunal, since the implied rejection of his request of 18 April 2012 occurred after he had separated from service.

On the merits he contends that the "aggressive" and "threatening" context surrounding his signature of the agreement invalidated his consent, which according to well-established precedent renders the agreement of 19 March 2012 null and void. He explains that, at the meeting on 20 March 2012, he was told that if he did not sign the agreement immediately, a performance improvement plan would be implemented which, it was intimated, was doomed to fail and which would lead to his separation without compensation for unsatisfactory performance. The complainant taxes the Global Fund with springing a surprise on him, as the quality of his performance had never previously been an issue and he did not think that he was concerned by the restructuring process, since its purpose was to strengthen the organisation's grant management. He emphasises that he never received a copy of his allegedly negative performance evaluation.

Referring again to the Tribunal's case law, the complainant contends that he was not given a period of reflection as, in his view, one night's respite was insufficient. He also maintains that he received no assistance, because he was not allowed to be accompanied by a staff representative at the meeting on 21 March 2012.

The complainant seeks the setting aside of the impugned decision, that of 9 April 2012 and the separation agreement which he signed. He also requests his reinstatement and the payment of one year's gross salary in compensation for the moral injury suffered. Subsidiarily he claims damages amounting to two years' gross salary. Lastly, he asks the Tribunal to award him costs in the amount of 10,000 euros and to find that, should these various sums be subject to national taxation, he would be entitled to a refund of the tax paid from the Global Fund.

C. In its reply the Global Fund, which is represented by an "associate" of a law firm, submits that the complaint is irreceivable because internal means of redress have not been exhausted. Some six weeks elapsed between the date on which the complainant signed his separation agreement and the date on which his employment ended. During that time he could have initiated the internal appeal procedure. In addition, the Appeal Board has always considered that it is competent to rule on disputes submitted by former employees. The Global Fund argues that the complaint is also irreceivable because, by signing the aforementioned agreement, the complainant waived any right of appeal.

Relying on Judgment 1934, the Fund maintains that if there is no evidence that pressure was brought to bear, a complainant may not call into question the terms of the separation agreement which he or she has signed. The complainant has not substantiated his allegations. The organisation contends that the criteria established by the case law which may lead the Tribunal to hold that consent is not valid are not met in the instant case. The complainant signed the document of 19 March 2012 of his own free will. As he was given one night to consider the matter, he cannot contend that he had insufficient time to study the offer made to him.

Moreover, the Global Fund explains that, since the restructuring process led to a redefinition of posts of the kind held by the complainant, some of the staff concerned were asked to undergo a performance improvement plan aimed at enabling them to fit successfully into the new structure. However, as it was presumed that

some employees "would not wish to invest the effort necessary for the success of such a plan", it was decided to offer them a generous separation agreement.

The Global Fund submits that, since the complainant found a new job in July 2012, he suffered no financial injury. As it considers the complaint to be vexatious, it asks the Tribunal to order the complainant to bear costs.

D. In his rejoinder the complainant comments that the Global Fund's counsel does not have the capacity to represent the organisation in accordance with Article 5, paragraph 3, of the Rules of the Tribunal.

Referring to the case law, he submits that he could not lodge an internal appeal against a decision taken after 30 April 2012, because no provision has been made for former employees to have access to internal means of redress, and that the Global Fund ought to have forwarded his grievance of 18 April 2012 to the competent authority or to the Appeal Board. He holds that the four stages of the internal appeal procedure at the Global Fund excessively delay the processing of disputes. As he considers that the internal appeal mechanisms are "extremely poorly designed", he argues that they are unlawful and that employees should not therefore be bound by them.

On the merits, the complainant enlarges on his pleas and emphasises that he has still not received his 2011 performance evaluation. He maintains that the sums he received are insufficient to redress the injury done to him by the unlawful termination of his appointment and the affront to his dignity. In this connection, he adds that, although he found a new job, it was only temporary.

E. In the surrejoinder which the Global Fund's counsel has filed on its behalf, he explains that he is fully entitled to represent the Fund as he is a lawyer.

As far as receivability is concerned, he argues that the e-mail of 18 April 2012 could not be regarded as an appeal. On the merits, he says that the separation agreement was not the outcome of the 2011 performance evaluation and notes that the complainant has not

supplied any evidence that he was not allowed to be accompanied by a staff representative at the meeting on 21 March 2012.

F. In his further submissions, the complainant presses all his pleas. He says that he received his evaluation report for the period 1 January 2011-23 March 2012 on 17 May 2013. In his opinion, this report, which contains the overall rating "partially achieves expectations", has been forged. Although he has not found stable employment, he withdraws his claim that the Tribunal should order his reinstatement.

G. In its final observations, the Global Fund deplores the vexatious nature of the complainant's further submissions and maintains its position.

CONSIDERATIONS

1. The complainant, who was employed by the Global Fund under a permanent contract, worked in the Southern Africa Team within the Grant Management Division.

On 20 March 2012 he was called to a meeting that was plainly part of the process of implementing the Fund's recently adopted "consolidated transformation plan", where he was offered a separation agreement in circumstances described in radically different terms by the parties to the dispute.

At another meeting on the following day, the complainant agreed to sign this document, taking the form of a letter from the Head of the Human Resources Department ("HR Director"), in which he consented to separating from the Fund on 30 April 2012, being placed on special leave up to that date and receiving a termination indemnity and a sum equivalent to six months' basic salary.

2. Although the agreement in question included clauses whereby the complainant waived any right of appeal, he immediately protested about the way in which he had been treated and contended that he had not freely consented to this agreement.

After a meeting with the Executive Director on 24 March 2012, the complainant wrote an e-mail on 27 March to the HR Director to contest the validity of the termination of his appointment, again to denounce the circumstances in which he had been led to sign the separation agreement and to request compensation for "the moral and professional prejudice [he] [had] suffered in [these] circumstances".

On 9 April, the Human Resources Business Partner replied that the Fund was "not in a position to negotiate further" the terms of his separation package.

By an e-mail of 18 April, the complainant then asked the General Manager "reconsider this position", as the termination of his appointment was "very unfair as to the form and the substance", and to "review [his] situation". This e-mail went unanswered.

3. It was against this background that on 19 June the complainant filed his complaint with the Tribunal seeking the setting aside of the implied decision arising out of the Fund's silence with regard to his grievance of 18 April, as well as compensation for the material and moral injury which he considered he had suffered.

4. In his rejoinder, the complainant contests the receivability of the Fund's reply, on the grounds that it was submitted by a person who did not have the requisite capacity. However, the Fund's reply and surrejoinder are signed by a lawyer who is a member of the bar in Member States of international organisations that have recognized the jurisdiction of the Tribunal, and who has produced a power of attorney duly issued by the Fund. He is consequently entitled, under Article 5, paragraphs 3 and 4, of the Tribunal's Rules, to represent the Fund in the present case.

5. The Fund contends that the complaint is irreceivable pursuant to Article VII, paragraph 1, of the Statute of the Tribunal, because the complainant did not exhaust the internal means of redress available to him before he filed it.

6. To counter this objection, the complainant mainly argues that, as he was no longer an employee of the Fund after 30 April 2012, he could not avail himself of these internal remedies to challenge an implied decision arising after that date.

This argument is unfounded.

(a) It is true that, contrary to the Fund's submissions, its former employees do not have access to the internal appeal procedure for which the applicable regulations make provision. Indeed, the regulations in force at the material time, as well as those which replaced them with effect from 1 August 2012, provide that the internal means of redress are open to "employees", but there is nothing in the texts governing the organisation's staff which specifies that this term also refers to former employees. The Tribunal has already had occasion to find, with regard to other international organisations' staff rules and regulations couched in similar language, that in the absence of any indication to the contrary in the applicable texts, this term must be interpreted as referring solely to serving staff members (see, in particular, Judgments 2840, under 17 to 21, 2892, under 6 to 8, or 3074, under 11 to 13). The Fund's argument that, in practice, the Appeal Board has so far agreed to consider appeals filed by former employees is no bar to the application of that case law.

(b) However, in the instant case, the sequence of events set out above shows that the complainant was notified of the termination of his employment with the Fund, which resulted from the actual terms of the separation agreement to which he was party, as early as 21 March 2012, even though that termination was to take effect only on 30 April, that is more than five weeks later. Before leaving the organisation, he thus had sufficient time to lodge an internal appeal against the disputed decision, and the fact that he subsequently ceased to be an employee of the Fund did not deprive him of the possibility of pursuing those proceedings to the end (see, for a similar case, Judgment 3202, under 10). Indeed, the question whether an employee separating from an organisation has access to the internal means of redress must be determined, for the entire appeal procedure, at the date on which he or she receives notification of the decision he or she

intends to challenge, and subsequent events have no bearing on this issue (see also *a contrario* the above-mentioned Judgments 2892, under 8, and 3074, under 13).

7. The complainant's contention that the provisions governing the internal means of redress applicable to the Fund's staff are unlawful because they are "extremely poorly designed" and that employees should not therefore be bound by them is equally unfounded.

The Tribunal is aware of the fact that the mechanisms under the Grievance and Dispute Resolution Procedure which was in force at the material time were highly complex, as they comprised no less than four successive levels of appeal, depending on the nature of the disputed decision. Where, as in the present case, the dispute concerned a decision taken by HRD, the four stages provided for in section 3.2.5 of this text consisted in review by the manager of the human resources team concerned, a facilitated resolution meeting convened by the Human Resources Director, appeal to the Director of Corporate Services and appeal to the Appeal Board.

Nevertheless, the undeniable complexity of the procedure, which probably helps to explain why it has since been substantially modified, does not in itself render unlawful the provisions which established it. Subject only to what is said under 8(c) below, employees of the Fund were therefore bound by them.

8. However, the Tribunal notes that, in fact, the complainant did initiate the prescribed internal appeal procedure, but that it was simply interrupted before completion.

(a) Indeed, there can be no doubt that the aforementioned e-mail of 27 March 2012 was an appeal against the disputed document. By sending it, the complainant initiated the first stage of the internal appeal procedure described above.

The negative reply of 9 April 2012 put an end to this first stage. In the particular circumstances of this case, it must also be deemed to have put an end to the second stage, insofar as the evidence shows that

it was preceded by a meeting between the complainant and the HR Director, which can be equated with the Facilitated Resolution Meeting provided for in the Grievance and Dispute Resolution Procedure, and that the reply was clearly issued on behalf of that authority.

Contrary to the Fund's submissions, the complainant's e-mail dated 18 April 2012 was an appeal against the decision contained in that reply. According to the Tribunal's case law, for a letter, or an e-mail, addressed to an organisation to constitute an appeal, it is sufficient that the person concerned clearly expresses therein his or her intention to challenge the decision adversely affecting him or her and that the request thus formulated can be granted in some meaningful way (see Judgments 461, under 3, 1172, under 7, 2572, under 9, and 3067, under 16). Given the content of the e-mail in question, which is summarised in consideration 2 above, these conditions are clearly met in this case and the defendant is therefore wrong in contending that it merely expressed "dissatisfaction".

As it was part of the third stage of the internal proceedings, this appeal was necessarily addressed to the authority competent to hear it, that is, in accordance with the provisions in force at the material time, the Director of Corporate Services. It should also be noted that the complainant filed it within ten working days, the time limit set by the combined provisions of sections 3.2.5 and 3.3.1 of the above-mentioned text.

(b) It is true that the two successive appeals thus lodged by the complainant were not submitted to the authorities competent to hear them. But consistent precedent has it that, although rules of procedure should ordinarily be strictly complied with, they must not set traps for staff members who are defending their rights and therefore they must not be construed with too much formalism. Consequently, an appeal submitted to the wrong authority is not irreceivable on that account and it is for that authority, in such circumstances, to forward it to the one which is competent, within the organisation, to hear it (see, for example, Judgments 1832, under 6, 2882, under 6, or 3027, under 7).

(c) In this case, a particular difficulty, for which the Fund was responsible, made it impossible to pursue the internal appeal procedure in the normal way. Indeed, the post of Director of Corporate Services was abolished in February 2012 and the duties exercised by the holder of that post were not specifically transferred to another authority. At the material time, section 3.2.5 of the Grievance and Dispute Resolution Procedure providing for an appeal to the said director, which had not been amended accordingly, had thus become inapplicable.

9. As there was no response to the appeal of 18 April 2012 within sixty days of the date on which it was lodged, pursuant to the provisions of Article VII, paragraph 3, of the Statute of the Tribunal it must be deemed to have been implicitly rejected, and that implied decision may be impugned by the complainant before the Tribunal.

10. It is clear that that decision is unlawful. The mere fact that the Fund rendered it impossible for the complainant's appeal to be dealt with in accordance with the applicable rules, owing to the abolition of the post of the authority competent to hear it, is sufficient to vitiate the decision taken on this appeal.

11. The Tribunal will not, however, examine the merits of the complaint in these proceedings.

When it transpires that the internal appeal procedure in force in an international organisation has not been followed properly, the Tribunal often decides – in some instances on its own initiative – to remit the case to the organisation, in order that the competent appeal bodies can hear it, rather than to examine its merits (see, for example, Judgments 1007, 2341, 2530, 2781 or 3067).

In the present case, that approach is clearly appropriate, for two reasons.

(a) First, it should be recalled that, as the Tribunal's case law has long emphasised, the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority (see, for example, the above-mentioned

Judgments 2781, under 15, and 3067, under 20). This is especially true since internal appeal bodies may normally allow an appeal on grounds of fairness or advisability, whereas the Tribunal must essentially give a ruling on points of law. Consequently, although in this case the complainant himself was mistaken as to his right to resort to the internal appeal procedure, it would be inappropriate to deprive him of the benefit of that procedure.

(b) Secondly, apart from the fact that the review of a disputed decision in an internal appeal procedure may well suffice to resolve a dispute, one of the main justifications for the mandatory nature of such a procedure is to enable the Tribunal, in the event that a complaint is ultimately lodged, to have before it the findings of fact, items of information or assessment resulting from the deliberations of appeal bodies, especially those whose membership includes representatives of both staff and management, as is often the case (see, for example, Judgments 1141, under 17, or 2811, under 11). As rightly pointed out by the defendant, the Appeal Board plays a fundamental role in the resolution of disputes, owing to the guarantees of objectivity derived from its composition, its extensive knowledge of the functioning of the organisation and the broad investigative powers granted to it. By conducting hearings and investigative measures, it gathers the evidence and testimonies that are necessary in order to establish the facts, as well as the data needed for an informed assessment thereof.

In the present case, it appears to the Tribunal all the more essential to have this background knowledge, since the parties essentially rely on statements giving profoundly different accounts of what actually happened during the individual meetings that were held in camera. It is particularly important to determine whether, as the complainant submits, he was "threatened", during these successive meetings, with being subjected to a performance improvement plan setting unattainable objectives, and with then being dismissed without compensation for unsatisfactory performance. It is also necessary to verify the truth of the complainant's assertion that his consent to the disputed agreement was obtained by misrepresenting the content of

his last performance evaluation, which according to him involved an unlawful weighting, and to establish the factual circumstances in which the meetings in question took place, especially with regard to the possibility of being assisted by a third party or having sufficient time for reflection. It is clear that, on these points, the submissions before the Tribunal would benefit from being significantly supplemented with information gathered during the internal appeal procedure.

12. The defendant raises a second, more fundamental objection to the receivability of the complaint, namely that the complainant, by signing the separation agreement, waived their right to challenge the validity or the content thereof. However, since, as just stated, the complainant contends that he signed this agreement under pressure and misrepresentation that vitiated his consent, the question of receivability is inseparable from the merits of this case. At this stage, the Tribunal will not, therefore, rule on this issue, which must also be examined in the course of the internal appeal proceedings, the main purpose of which will be to ascertain whether these allegations are true.

13. It follows from the foregoing that the implied decision rejecting the complainant's appeal filed on 18 April 2012 must be set aside and the matter remitted to the Fund for the resumption of the internal appeal proceedings which were unduly interrupted.

In view of the abolition of the post of Director of Corporate Services, to which reference was made above, the third stage of these proceedings, as provided for in the aforementioned text, will have to be omitted and the proceedings will have to be resumed directly at the fourth stage, that is, referral to the Appeal Board, so that the latter can make a recommendation to the Executive Director.

The complainant will therefore have to lodge an appeal with the Appeal Board within 60 calendar days of the delivery of this judgment. The procedure before the Board will be that which is laid

down in the regulations governing the functioning of the Board in force at the time when the matter is referred to it.

14. Since he succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 1,500 euros.

15. The complainant requests the Tribunal to find that, should this sum be subject to national taxation, he would be entitled to a refund of the tax paid from the Global Fund. However, in the absence of a present cause of action in this respect, the claim must be dismissed as irreceivable (see, for example, Judgments 3255, under 15, or 3270, under 10).

16. The Fund requests, as a counterclaim, that the complainant be ordered to pay costs. But the very fact that the complainant succeeds in part is sufficient to demonstrate that his complaint was not vexatious and that this claim must therefore be rejected.

DECISION

For the above reasons,

1. The implied decision rejecting the appeal filed by the complainant on 18 April 2012 is set aside.
2. The complainant's case is remitted to the Global Fund so that the internal appeal proceedings may be resumed, as indicated under consideration 13, above.
3. The Fund shall pay the complainant 1,500 euros in costs.
4. The complainant's other claims are dismissed, as is the Fund's counterclaim.

In witness of this judgment, adopted on 14 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman,

Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

(Signed)

GIUSEPPE BARBAGALLO PATRICK FRYDMAN MICHAEL F. MOORE

DRAŽEN PETROVIĆ