Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

W.

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

127th Session **Judgment No. 4075**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A. W. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter "the Global Fund") on 2 August 2016 and corrected on 12 December 2016, the Global Fund's reply of 10 April 2017, the complainant's rejoinder of 17 June, corrected on 27 June, and the Global Fund's surrejoinder of 27 September 2017;

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 contests the Global Fund's decision to amend the methodology used for the calculation of the tax equalization payments made to eligible staff members.

The complainant is a national of the United States of America who joined the Global Fund in 2011. Pursuant to the Headquarters Agreement concluded between the Swiss Federal Council and the Global Fund in 2004, she has been exempted throughout her employment with the latter from paying taxes in Switzerland on her Global Fund income. At the same time, as a national of the United States, the complainant has remained under an obligation to pay taxes to the United States

Government on her Global Fund and other taxable income. She has, however, received tax equalization payments from the Global Fund pursuant to its Tax Equalization Policy, which was adopted in 2009 to compensate staff subject to citizenship-based taxation for the taxes paid on their Global Fund employment income.

In the context of discussions that took place between the Administration and the Staff Council in early 2015 regarding the tax equalization payments, the Administration obtained an opinion from a private consultancy, which concluded that the methodology used for the calculation of the tax equalization payments resulted in the Global Fund covering not only taxes payable on Global Fund income, but also taxes payable on income from other sources.

By an email of 1 May 2015, the Chief of Staff informed all Global Fund employees that the methodology used for the calculation of the tax equalization payments would be revised so as to eliminate any inequalities resulting from its application for staff not in receipt of such payments. She explained that the way in which tax equalization payments had been calculated thus far had resulted in the reimbursement by the Global Fund of taxes payable on non-Global Fund income, i.e. on income from other sources, and therefore in a situation that created inequity as it unfairly benefited households of staff receiving such payments.

On 23 July 2015 the complainant submitted a Request for Resolution challenging the revision of the calculation methodology announced on 1 May 2015 and requesting that it be rescinded. That Request was rejected and on 23 November 2015 the complainant submitted an appeal to the Appeal Board. On 18 April 2016 the Appeal Board recommended that the appeal be dismissed as irreceivable, as it was directed against a general decision. By a letter dated 29 April 2016, the Executive Director informed the complainant that he had decided to endorse the Appeal Board's recommendation. That is the impugned decision.

The complainant asks the Tribunal to quash the Executive Director's decision of 29 April 2016, by which the earlier decision of 1 May 2015 was maintained, and to recognise that the Global Fund's new calculation methodology is discriminatory and contrary to the principle of "equal pay for equal work" and that it should be cancelled.

She also asks the Tribunal to recognise that the calculation methodology is "grandfathered" for staff who joined the Global Fund through WHO and that it ought to be "grandfathered" for any staff who joined the Global Fund prior to the change of its Tax Equalization Policy. She seeks compensation for her financial loss and she claims moral damages and costs.

The Global Fund asks the Tribunal to dismiss the complaint as irreceivable and unfounded.

CONSIDERATIONS

1. In January 2009 the Global Fund adopted a Tax Equalization Policy to remedy the financial disadvantages faced by staff members who are subject to taxation on their Global Fund income in their home country, such as staff members holding United States citizenship. These staff members, unlike other staff members who are exempted from taxation on Global Fund income, are required to pay income taxes to the United States on taxable income received from the Global Fund. On 1 May 2015 the Chief of Staff announced the Administration's decision to amend the methodology used for the calculation of tax equalization payments to address the inequity caused by the previous accounting method. For the present purposes it is not necessary to provide additional detail underpinning the change in the Tax Equalization Policy.

2. On 23 July 2015 the complainant submitted a Request for Resolution concerning the Administration's 1 May 2015 decision which was rejected. The complainant lodged an appeal with the Appeal Board challenging the decision to amend the calculation methodology for determining the reimbursement payable under the Tax Equalization Policy. The Appeal Board concluded that, as the complainant's appeal was lodged against the decision to amend the Tax Equalization Policy and not a decision implementing that Policy, it was irreceivable. In his 29 April 2016 decision, the Executive Director endorsed the Appeal Board's conclusion and dismissed the appeal as irreceivable. This is the impugned decision.

3. The Global Fund submits that as the complainant impugns a decision of general application and not an individual decision applicable to her, the complaint is beyond the Tribunal's competence as defined in Article II, paragraph 5, of the Tribunal's Statute and is irreceivable.

The complainant contends that the impugned decision is not a decision of general application. Rather, it applies to a specific group of staff members including herself. The complainant submits that, even if it did apply to all staff members, it is sufficient that the decision has had a specific and material negative impact on her by substantially reducing her net income beginning in the 2015 tax year. The complainant acknowledges that she has not received her tax calculation for 2015 as at the time of filing her rejoinder but submits that she should receive it before the end of 2017. However, she states that she can provide the Tribunal with an estimate of the actual financial losses she will suffer as calculated by the Global Fund's own tax adviser.

In her rejoinder, the complainant points out that these financial losses will continue to accrue annually while she is employed by the Global Fund. Accordingly, she asks the Tribunal "for the sake of efficiency and to avoid having to file a new [...] complaint [with the Tribunal] on an annual basis" to render a decision on the Global Fund's "change of tax equalization policy going forward, not an assessment specific to 2015".

4. The Tribunal has consistently held that "a complainant cannot attack a rule of general application unless and until it is applied in a manner prejudicial to [the complainant]" (see, for example, Judgments 3427, under 31, 4028, under 3, 3628, under 4, and 3291, under 8). It is clear that the decision to amend the calculation of the tax equalization payments is a decision of general application that would necessarily require implementation through an individual decision to have any effect on a staff member. It follows that the decision was not open to challenge by the complainant until the new methodology was applied to calculate the amount of the tax equalization payment due to her for a particular year. This was not the case at the time the complainant submitted her Request for Resolution. Article II, paragraph 5, of the Tribunal's Statute provides that the Tribunal is competent to hear

complaints "alleging non-observance, in substance or in form, of the terms of appointment [...] and of provisions of the Staff Regulations". As the Administration's 1 May 2015 decision was a decision of general application and was not applied to the complainant through an individual decision, the complaint is beyond the scope of the Tribunal's competence and is irreceivable and 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