Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

N. (R.)

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

128th Session **Judgment No. 4139**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms R. N. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter "the Global Fund") on 7 April 2015 and corrected on 30 May, the Global Fund's reply of 15 September 2015, the complainant's rejoinder of 13 January 2016 and the Global Fund's surrejoinder of 21 April 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 decision to terminate her fixed-term contract as a result of her post having been abolished.

At the beginning of 2012, the Global Fund published a vacancy announcement for a grade 7 senior human resources officer post in the Human Resources Department. The announcement stated that the incumbent of the post would be the senior Human Resources Officer. The complainant applied and, on 12 October 2012, received an offer of appointment by email. On 9 November 2012 she signed a two-year fixed-term contract, which provided that she would take up her duties on 1 June 2013.

By an email of 6 March 2013 – which she forwarded to the complainant – the Head of the Human Resources Department informed all staff that since taking up her duties one month previously, she had in particular adjusted the organizational chart of the Department to meet the needs of the organization and that when she assumed her duties, the complainant, with Ms R., who would be under her authority, would be responsible for the administration of human resources for the Grant Management Division.

By a letter of 5 November 2013, the Head of the Human Resources Department informed the complainant that, as a result of the reorganization – launched in March 2013 – of the aforementioned Department, her post had been abolished with immediate effect. However, she offered the complainant a grade 6 human resources officer post in the Grant Management Division, which – she pointed out – corresponded to the tasks assigned to her since she took up her duties. If the complainant rejected this offer, a reassignment process, which could last up to six months and provided for the possibility of signing a separation agreement by mutual consent, the essential elements of which were communicated to her, would be launched. If the process failed, the complainant's post would be abolished. On 1 December the complainant replied that she declined the offer of the post and that the terms of the separation agreement were not satisfactory. On 2 December 2013 the Director of Human Resources informed her that, in view of this refusal and of the fact that there was no possibility of reassignment to a grade 7 post, her contract was terminated with six months' notice.

On 29 January 2014 the complainant submitted a Request for Resolution. Claiming that she had never performed the duties of the position to which she had been appointed, she maintained that she should have been informed of such a possibility well before she entered into service. In addition, she complained that the organization had not informed her of its intention to abolish her post and challenged the termination of her contract. She sought compensation for the injury which she considered she had suffered. On 28 March 2014 the Head of

the Human Resources Department informed the complainant that her request had been rejected.

The complainant then referred the matter to the Appeal Board. She requested that the decision of 28 March 2014 be set aside as well as the decisions to abolish her post and terminate her contract. She also sought compensation for the material, moral and professional injury which she considered she had suffered. Lastly, she requested that further discussions aimed at reaching a fair separation agreement and not involving the Head of the Human Resources Department be held.

In its report of 23 December 2014, the Appeal Board, which had heard the parties on 14 November, stated that the complainant could normally have been assigned to a post other than that to which she had been appointed, but underscored that she had not received formal notification of the decision to modify her duties. Although it considered that the complainant had been informed by the email of 6 March 2013 that her post "had changed", the Board noted that she should have questioned the Head of the Human Resources Department on this matter after taking up her duties. In addition, the Board noted that the complainant had benefited from a reassignment process even though she was not entitled to such a process under section 19 of the Employee Handbook. It added that the decision to terminate the complainant's contract was justified given that she had declined the offer of reassignment that had been made to her and that there was no other post to which she could have been reassigned. The Board noted that the complainant had already received all amounts to which she was entitled under the relevant provisions of the Employee Handbook and that, consequently, she was not entitled to any additional compensation. While the Board was not competent to recommend that further discussions should be held concerning the eventual conclusion of a separation agreement, it recommended that an apology should be made to the complainant, in particular for the fact that she had not been given due and timely notification of the decision to abolish her post.

By a letter of 7 January 2015, which constitutes the impugned decision, the Executive Director informed the complainant that he endorsed the Appeal Board's recommendation and he therefore offered his apologies, while dismissing her appeal.

The complainant asks for the impugned decision and the "initial decisions" to be set aside. She claims compensation in the amount of at least 50,000 euros for the moral injury which she considers she has suffered and, in compensation for alleged material injury, an amount which should be assessed taking into account the fact that she could legitimately expect her contract to be renewed for a period of two years. Lastly, the complainant claims 10,000 euros in costs.

The Global Fund submits that the complaint should be dismissed as unfounded. It explains that, as a result of an administrative error, the complainant received an overpayment in the amount of 29,989.75 Swiss francs. It asks the Tribunal to declare its right to reimbursement of this sum.

In her rejoinder, the complainant submits that since the Global Fund did not ask her to repay the above-mentioned sum within a reasonable time, it can no longer do so.

In its surrejoinder, the Global Fund maintains its position.

CONSIDERATIONS

1. The complainant impugns the decision of 7 January 2015 whereby the Executive Director of the Global Fund dismissed her appeal against the decisions of the Head of the Human Resources Department of 5 November 2013, 2 December 2013 and 28 March 2014 to abolish her post, terminate her contract and dismiss her Request for Resolution of the dispute arising from these adverse measures, respectively.

2. The Tribunal has consistently held that a decision concerning the restructuring of an international organization's services, including one involving the abolition of a post, lies at the discretion of the executive head of the organization and is therefore subject to only limited review. The Tribunal must verify whether this decision was taken in accordance with the rules on competence, form or procedure,

whether it involves an error of fact or of law, whether it constituted misuse of authority, whether it failed to take account of material facts or whether it draws clearly incorrect conclusions from the evidence (see, for example, Judgments 1131, consideration 5, 2510, consideration 10, 2933, consideration 10, 3582, consideration 6, or 4099, consideration 3).

3. One of the pleas raised by the complainant against the decision of 5 November 2013 to abolish her post, which falls within the scope of that limited review, is decisive for the outcome of this dispute.

The plea in question is that the author of that decision had no authority to take it.

4. Section 19 of the Employee Handbook provides, in the paragraph on termination in the event of redundancy, that "[t]he Executive Director may at any time terminate the appointment of an employee or group of employees due to financial reasons, or if the jobs in question are no longer needed by the Organization".

Although neither these provisions nor the other rules governing the staff of the Global Fund clearly specify the authority competent to decide, prior to such a termination of contract, to abolish a post with the likelihood that a termination will ensue, it is clear that this authority can only be, in accordance with the case law cited above, the Executive Director himself, by virtue of the general authority conferred upon him as the executive head of the organization.

However, the decision of 5 November 2013 to abolish the complainant's post was taken, as indicated above, by the Head of the Human Resources Department.

5. The Global Fund, which does not dispute that such a decision is by its nature within the competence of the Executive Director, maintains that the Head of the Human Resources Department did, however, have the authority – as the Appeal Board held – to act on behalf of the Executive Director. The Global Fund argues that under section 22 of the Employee Handbook, the powers of the Executive Director can be exercised by his "delegates". It emphasizes that it is a customary practice

at the Global Fund for "communications [...] relating to the abolition of a post or termination of a contract to be signed by the Head of the Human Resources Department and not by the Executive Director".

Although the aforementioned section 22 of the Handbook does envisage the possibility that the Executive Director might delegate his powers, such delegation must still have been duly established. However, it must be noted that the Global Fund has not been able to produce the delegation allegedly granted to the Head of the Human Resources Department to take decisions of this kind, whereas when a complainant seriously questions the actual delegation of powers, the defendant organization is required to establish proof of their delegation (see Judgments 1185, consideration 2, 2028, consideration 8, paragraph (3), 2558, consideration 4(a), 3071, consideration 27, and 3494, considerations 16 and 17).

In addition, the argument that the signature of such decisions by the Head of the Human Resources Department was common practice at the Global Fund should not be accepted. It is a matter of principle that an illegal practice cannot become legally binding (see, for example, Judgments 1390, consideration 27, 2259, considerations 8 and 9, 2411, consideration 9, 2959, consideration 7, or 3544, consideration 14, and, for a case similar to the present case, the above-mentioned Judgment 3071, consideration 28).

6. The Tribunal's case law recognizes that the decision of the executive head of an organization may be communicated to the official concerned, as is common practice, by means of a letter signed by the head of human resources management (see, for example, Judgments 2836, consideration 7, 2837, consideration 4, 2871, consideration 7, 2924, consideration 5, or 3352, consideration 7). However, it must be clear from the terms of that letter, or, at least, from consideration of the documents in the file, that the decision in question was indeed taken by the executive head himself.

However, in this case, the letter of the Head of the Human Resources Department containing the decision of 5 November 2013 does not mention that the decision was taken by the Executive Director

and no other document in the file would indicate that he was the author of that decision.

The Global Fund maintains, in this regard, that the Chief of the Executive Director's management team was involved in dealing with the complainant's situation. However, this would not be enough to establish that the decision in question was taken by the Executive Director himself.

Lastly, the fact, also relied on by the defendant, that the Executive Director had dismissed the complainant's appeal against the decision of the Head of the Human Resources Department – which he could only have done by disavowing the latter and putting the organization in a delicate position – did not imply that he would necessarily have taken the same initial decision that she had.

7. The unlawfulness of the decision of 5 November 2013 to abolish the complainant's post also, as a result, renders unlawful the decision of 2 December 2013 to terminate her contract, which was taken on the basis of the previous decision.

Furthermore, the decision of 2 December 2013 was itself flawed in that it was taken without authority. The provisions, cited above, of section 19 of the Employee Handbook provide expressly that the termination of an employee's contract in the event of redundancy is the responsibility of the Executive Director. However, this decision, too, was signed by the Head of the Human Resources Department who was unable to prove, again, that she had been delegated the authority to do so, nor does it appear from the file that she was merely communicating a decision made by the Executive Director himself.

In these circumstances, the Request for Resolution and, in turn, the appeal submitted by the complainant were wrongly dismissed by the decisions of 28 March 2014 and 7 January 2015, since the authors of those decisions should have noted the irregularities in question.

8. It follows from the foregoing that the decision of the Executive Director of the Global Fund of 7 January 2015, as well as the decisions of the Head of the Human Resources Department of 5 November 2013, 2 December 2013 and 28 March 2014, must be set aside, without there being any need to examine the complainant's other pleas.

9. The complainant, who does not ask to be reinstated at the Global Fund, seeks compensation for material and moral injury resulting from the abolition of her post and the subsequent termination of her contract.

10. With regard to compensation for material injury, the setting aside of the aforementioned decisions should in principle require that the complainant be paid the salaries and allowances that she would have received had her contract, which was a two-year contract starting from 1 June 2013, run its term, after deduction of the salaries paid to her during the six months' notice period that she was given – namely, until 2 June 2014 – and the remuneration received in respect of any other professional activity during that period.

In this regard, the Tribunal cannot accept the complainant's argument that compensation for the injury in question should take into account a possible renewal of her contract, since such a prospect was purely hypothetical and even, in this case, highly unlikely, in view of the magnitude of the threat to her post.

With regard to the remuneration received by the complainant after the termination of her contract, it appears from the file that the complainant, who was formerly working at the World Bank and had taken leave without pay for her recruitment to the Global Fund, returned to work for her releasing organization from 1 October 2014. However, the defendant maintains, without being effectively contradicted by the complainant, that the complainant, who was entitled to terminate her leave without pay early, did not apply to be reinstated as soon as she could have done after her contract was terminated and argues that the Global Fund cannot be held responsible for the loss of remuneration that could potentially have resulted from this choice. Indeed, this circumstance is such as to justify a reduction in the amount of damages awarded to the complainant, since it is an established principle that a staff member is required to limit, to the extent possible, the damage that may be caused to him by an administrative decision (see, for example, Judgment 3107, consideration 9).

11. With regard to moral injury, the complainant argues, convincingly in the eyes of the Tribunal, that her recruitment to the Global Fund to a post at a higher level than that which she formerly occupied at the World Bank "marked a significant step forward in her professional life" and that she had since then been painfully aware that as a result of the unlawful decisions taken concerning her "this experience turned into a fiasco through the fault of the defendant". While it cannot be taken as established that, as the complainant maintains, this situation "has had serious repercussions, including in [her] personal life", it is no less clear that the decisions concerned caused the complainant substantial moral injury, which also calls for compensation.

The Tribunal will not, however, accept the complainant's argument that this injury was aggravated by a lack of care for her on the part of the Global Fund and by acts undermining her dignity. In the light of all the documents in the file, this argument appears unfounded for the reasons properly set out by the Appeal Board in its report of 23 December 2014, which are entirely consistent with the Tribunal's assessment of the matter and which the Tribunal endorses.

Lastly, while it is true that, as the Board also noted, the Global Fund made errors in its communication with the complainant concerning the abolition of her post, the Tribunal considers that the apologies offered by the organization in this regard in the letter of the Executive Director communicating the decision of 7 January 2015 constitute sufficient redress. In this regard, it should be added that the setting aside of the aforementioned decision by the present judgment cannot, of course, be understood as calling into question those apologies themselves.

12. Taking into account all of the foregoing considerations, the Tribunal finds that the injuries suffered by the complainant would be fairly redressed by awarding her compensation in the amount of 50,000 euros under all heads.

13. Since the complainant has largely succeeded, she is entitled to costs, which the Tribunal sets at 7,000 euros.

14. By way of a counterclaim, the Global Fund asks the Tribunal to recognize its right to recover the sum of 29,989.75 Swiss francs paid in error to the complainant when she separated from the organization.

It appears from the file that due to an administrative error, the complainant had actually been paid twice the remuneration – corresponding to this amount – due to her for the period from 1 April to 2 June 2014, which had been paid to her cumulatively in the form of salaries and compensation in lieu of notice.

It is a general principal of law that any sum which has been paid in error may be recovered, provided that the request for reimbursement is made in reasonable time (see, inter alia, Judgments 1195, consideration 3, 2230, consideration 13, 2565, considerations 7(a) and 7(c), and 2899, consideration 20).

In this case, the complainant maintains that the Global Fund did not seek to recover the disputed sum within a reasonable time. However, the fourteen and a half months that elapsed between the payment of this sum, on 25 June 2014, and the defendant's request for its reimbursement, mentioned in the defendant's reply of 15 September 2015, cannot be considered an unreasonable delay in bringing such a claim.

According to the Tribunal's case law, an organization's right to recover an overpayment must be partially – or fully – denied if the circumstances of the case show that the reimbursement sought would be unfair or inequitable for the staff member concerned (see Judgments 1111, consideration 2, 1849, considerations 16 and 18, and 2899, aforementioned, consideration 20). In the present case, however, there are no particular circumstances that would lead to the conclusion that the complainant should be exonerated from reimbursing the sum overpaid to her, it being noted that the error committed was of such a magnitude that the complainant could not reasonably have thought that this amount was really owed to her.

The Tribunal therefore considers that it must rule that the Global Fund shall be entitled to deduct from the amount of the awards made against it the aforementioned sum of 29,989.75 Swiss francs in order to recover the disputed overpayment.

DECISION

For the above reasons,

1. The decision of the Executive Director of the Global Fund of 7 January 2015, as well as the decisions of the Head of the Human Resources Department of 5 November 2013, 2 December 2013 and 28 March 2014, are set aside.

2. The Global Fund shall pay the complainant 50,000 euros in damages under all heads.

3. It shall also pay her the sum of 7,000 euros in costs.

4. All other claims are dismissed.

5. The Global Fund shall be entitled to deduct from the amount of the above awards the sum of 29,989.75 Swiss francs in order to recover the overpayment.

In witness of this judgment, adopted on 3 May 2019, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ