Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

M.

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

135th Session **Judgment No. 4579**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. M. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter "the Global Fund") on 18 May 2020 and corrected on 25 August, the Global Fund's reply of 29 October 2020, the complainant's rejoinder of 10 May 2021 and the Global Fund's surrejoinder of 6 August 2021;

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 challenges the decision to discharge him.

At the material time, the complainant – who had joined the Global Fund in 2008 pursuant to an open-ended contract which was converted into a permanent contract in 2013 – held the post of […] Manager in [a] Department. On 29 November 2018 he and other staff members flew back to Geneva (Switzerland) from […], where they had attended a regional meeting. Upon entering the airplane, the complainant was seated next to one of his female colleagues, Ms X., who […] held the same professional grade. During the flight, he asked her questions of a sexual nature. As soon as the plane landed at the stopover in Zurich (Switzerland), Ms X. sent a message to another team member who was travelling with them indicating that she felt uncomfortable, and she did

not want to remain alone with the complainant. On 3 December 2018 she reported the incident to the Administration.

On 13 December 2018 the complainant was informed by the Head of the Human Resources Department that one of his colleagues had reported allegations of inappropriate behaviour by him on or around 29 November 2018. The allegations brought forward were "unwelcome touching of a co-worker on the shoulders and back" and "inappropriate, persistent personal questions of [a] sexual nature that were unwelcome". He was advised that an investigation would be initiated with the objective of determining the facts underlying those allegations and was given the opportunity to comment and provide any information or documentation relevant to the investigation.

The investigation was conducted by a staff member of the Human Resources Department, who interviewed the complainant, Ms X. and other witnesses. On 15 January 2019 the investigator sent a draft investigation report to the complainant, who provided his comments on 25 January and requested that a meeting with Ms X. be organized "in a safe environment" to express his "sincere regrets" regarding the reported incident.

On 6 February 2019 the investigator issued his final report in which he found that the allegations of "inappropriate, persistent personal questions of [a] sexual nature that were unwelcome" were substantiated. By a Letter of Charges of 25 February 2019, the complainant was notified that, based on that finding, it had been decided to continue with the disciplinary proceedings. A copy of the final investigation report, including witness statements and all attachments thereto, was annexed to the letter. The complainant provided his comments on 19 March and expressed his apologies and his regret for the "emotional distress" caused to Ms X. He requested that the Administration duly take into account the mitigating circumstances surrounding his case.

The complainant was invited to a hearing before the Disciplinary Panel on 12 April 2019, which he accepted. By a letter dated 8 May 2019, the Executive Director informed him that the Panel had found that his behaviour constituted a breach of the relevant provisions of the Code of Conduct. The Executive Director further indicated that the sexual nature of the complainant's inappropriate conduct amounted to a

grave violation of the Code, which warranted a serious sanction. Given his cooperative behaviour during the investigation, the Executive Director decided to discharge him as from 8 August 2019, in accordance with the applicable notice period, instead of applying the more severe sanction of summary dismissal recommended by the Disciplinary Panel. By a separate letter also dated 8 May, the Administration provided the complainant with the detailed terms of his separation from the Global Fund and advised him that he would be suspended with full pay until the date of the separation.

The complainant requested a mediation on 18 June 2019. His request was rejected on 25 June on the basis that such a mechanism would not be appropriate to resolve his case. He lodged a request for appeal on 7 July. As an interim relief, he asked for the continuation of his employment until the case was settled. As main claims for relief, he sought, inter alia, his reinstatement, the imposition of a less serious sanction, whenever necessary, a written apology from the Global Fund and the award of damages.

After having heard the parties, the Appeal Board issued its report on 13 February 2020. It considered that there were no flaws in the disciplinary procedure and that the sanction imposed on the complainant was not disproportionate. It recommended dismissing the appeal. This recommendation was endorsed by the Executive Director in the 18 February 2020 decision, which is impugned in the present proceedings.

The complainant asks the Tribunal to set aside the impugned decision, as well as all the measures accompanying his dismissal: his suspension with full pay, the decision to immediately replace him and the announcement made to all staff that he was “no longer” with the Global Fund. He further seeks his reinstatement into his position or in such other position which would suit his experience and qualifications, and the payment of his salary and allowances with retroactive effect as from 8 August 2019, plus 5 per cent interest per annum as from that date. He also requests the Tribunal to declare that he has done nothing wrong and that he must not be subject to disciplinary sanctions or, in the alternative, to declare that a less serious sanction must be applied

preserving his employment with the Global Fund and his and his family's residence permit in Switzerland. He asks the Tribunal to order the Global Fund to issue a written apology for the way he had been treated and to award him moral damages for the prejudice allegedly suffered which, in case of reinstatement, should not be less than two years' salary, and, in case of non-reinstatement, should not be less than five years' salary, as well as costs in an amount of no less than 50,000 Swiss francs. In his rejoinder, he argues that it appears inappropriate to refer the case back to the defendant and requests the Tribunal to decide it as a last instance.

The Global Fund submits that the claims pertaining to declarations of law and the issuance of a written apology are irreceivable as the Tribunal has no competence to grant such redress. It asks the Tribunal to reject the complaint as partly irreceivable and entirely unfounded and to order that the complainant bear all the costs he has incurred.

CONSIDERATIONS

1. The complainant requests oral proceedings. Pursuant to Article V of the Statute of the Tribunal, "[t]he Tribunal, at its discretion, may decide or decline to hold oral proceedings, including upon request of a party". In this case, the Tribunal finds the written submissions to be sufficient to reach a reasoned decision, and thus the request is rejected.

2. Before addressing the complainant's pleas, it is appropriate, at the outset, to recall the essential facts of the case.

On 3 December 2018 Ms X., an official of the defendant organisation, lodged a grievance with the Human Resources Department via email reporting an incident that occurred while travelling back to Geneva after attending a conference […] between 26 and 29 November 2018. Ms X. reported that one of her colleagues, Mr M. (who is the present complainant), asked her questions that were personal and sexual in nature. Ms X. complained that the conversation was unwanted, made her

feel uncomfortable, and added that she did nothing to prompt this type of conversation.

Four officials were interviewed during the investigation, namely Ms X., the complainant, and two witnesses.

The final investigation report dated 6 February 2019 considered substantiated Ms X.'s allegation concerned with the conversation of a sexual nature and unsubstantiated the further two allegations (regarding the physical contact in the airport and the sentence pronounced in the plane by the complainant and addressed to the passenger originally seated between him and Ms X.).

The Letter of Charges of 25 February 2019 followed, inviting the complainant to comment on the charges against him within 15 working days as of the date of the letter.

The complainant reacted by an email dated 19 March 2019, in which he admitted that his behaviour had been inappropriate, but he alleged his good faith, apologized to the organization and offered to apologize formally to Ms X. He promised that such an incident would never happen again.

He further apologized during the hearing held on 12 April 2019.

Following the hearing, the complainant was invited to comment on the minutes of the hearing.

3. By his first plea, the complainant alleges the breach of the principles of due process, equality of arms and adversarial proceedings. He complains that he was not given the opportunity to confront his accuser, Ms X., and that the investigator heard a further witness, Ms Y., but that he was not allowed to cross-examine her nor was he provided with the record of her interview and allowed to comment on it.

Having regard to the steps carried out during the disciplinary proceedings, the complainant's first plea is unfounded. He was given ample opportunity to participate in the disciplinary proceedings and to comment on its findings. Namely:

– he was heard before the issuance of the 6 February 2019 final investigation report;

– he was provided with the full text of the 6 February 2019 final investigation report, containing the written record, although not a verbatim record, of the statements of Ms X. and of the two witnesses; the final investigation report was sent to the complainant in an attachment to the 25 February 2019 Letter of Charges;
– the Letter of Charges granted the complainant a sufficient and reasonable time span of 15 days to comment on the charges and informed him that, further to his comments, he would be invited to a disciplinary hearing;
– he was heard during the 12 April 2019 hearing and was allowed to comment on the minutes of the hearing.

The circumstance that he was not allowed to cross-examine Ms X. is not relevant, since: (i) the cross-examination by the accused of the accuser is not provided for by the relevant rules (Annex IX to the Employee Handbook); (ii) the complainant was provided with a written record of Ms X.'s statements; (iii) and there is, in essence, no disagreement between Ms X. and the complainant as to the content of their conversation. In the circumstances of the case, a confrontation between the accuser and the accused was unnecessary.

It is noteworthy that, according to the Tribunal's case law, the verbatim record of the oral evidence gathered during disciplinary proceedings is not deemed strictly necessary. It is sufficient that the person charged in disciplinary proceedings be informed of the precise allegations made against her or him, provided with the summaries of the witnesses' testimonies relied upon by the body in charge of the investigation, and enabled to comment on them (see Judgment 2771, consideration 18).

As to Ms Y., she was never officially heard, and her letter was not used as a ground to support the charges against the complainant or to establish the proper disciplinary sanction. There is no trace of a claim from a Ms Y., either in the final investigation report, or in the record of the oral hearing, or in the decision of discharge and in the impugned decision. Consequently, the complainant had no right, and even no need, to cross-examine Ms Y., nor to comment on her letter.

4. By his second and third pleas, which can be examined together, the complainant alleges that:

(i) relevant facts and considerations submitted by him were overlooked; the incriminating conversation between him and his accuser was brief and reciprocal, and the victim agreed on many of the facts;

(ii) the good faith of the alleged victim should be questioned, since she exaggerated the gravity of the incident.

These pleas are unfounded.

The Tribunal's case law has it that disciplinary decisions are within the discretionary authority of the executive head of an international organization and are subject to limited review. The Tribunal must determine whether a discretionary decision was taken with authority, was in regular form, whether the correct procedure was followed and, as regards its legality under the organization's own rules, whether the organization's decision was based on an error of law or fact, or whether essential facts had not been taken into consideration, or again, whether conclusions which are clearly false had been drawn from the documents in the dossier, or finally, whether there was a misuse of authority (see Judgment 3297, consideration 8, quoting Judgment 191). Additionally, the Tribunal shall not interfere with the findings of an investigative body in disciplinary proceedings unless there was a manifest error (see Judgments 4444, consideration 5, and 4065, consideration 5).

In the present case, there are no errors of law or fact in the impugned decision nor in the disciplinary decision. The submission that relevant facts were overlooked is unfounded. The complainant and the accuser agreed on the essential facts, that is the content of their conversation. The complainant admitted, on multiple occasions, the inappropriateness of his behaviour.

The submission that the accuser was in bad faith and exaggerated the gravity of the incident is completely devoid of merit. The good faith of the accuser was never questioned during the disciplinary proceedings, nor does the complainant provide evidence of bad faith in the present

complaint as required by the case law (see, for example, Judgment 3902, consideration 11).

5. By his fourth plea the complainant submits that the charges refer to the violation of the Code of Conduct and not to harassment, nonetheless the outcome of the disciplinary proceedings seems to suggest that the complainant was, in the essence, found guilty of harassment.

The Tribunal views this plea as another way of saying that, in the absence of a charge of harassment, the sanction of discharge was not appropriate.

This plea is well founded. The Letter of Charges of 25 February 2019 made no reference to harassment. That is, there is no express charge of "gross misconduct" constituted by harassment. The decision of discharge makes reference to the "breach of Section I of the Code of Conduct – providing that in relationships with colleagues, employees must always protect the dignity and integrity of others – and Section III of the Code of Conduct – providing that employees must treat each other with consideration, courtesy, dignity and open-mindedness" and concludes that "the sexual nature of your inappropriate conduct is a grave violation of the Code of Conduct and warrants a serious sanction". The decision does not expressly specify whether the complainant's behaviour amounts to "misconduct" or "gross misconduct", but imposes the disciplinary sanction of discharge which, according to the Employee Handbook, is an appropriate sanction for "gross misconduct" and not also for "misconduct". In the said Handbook harassment is given as an example of "gross misconduct" but the organization eschews the disciplinary proceedings were maintained on the basis that the complainant was guilty of harassment. Moreover, the breach of the Code of Conduct as described in the discharge decision is not included in the cases of "gross misconduct" as listed in the Employee Handbook. It rather accords with the illustrative instances of "misconduct", namely "breach of the employee's duties and obligations". Since the conduct the complainant was charged with is a case of "misconduct" and not of "gross misconduct", the applicable sanction should have been chosen among those provided for "misconduct", which do not include discharge.

6. In light of what is stated in consideration 5 above, there is no need to address the complainant's fifth plea.

7. The complainant seeks reinstatement. As a rule, an official dismissed on disciplinary grounds whose dismissal is set aside is entitled to be reinstated. However, the Tribunal may refuse to make such an order if reinstatement is no longer possible or if it is inappropriate. According to the Tribunal's case law, reinstatement is inadvisable when an employer has valid reasons for losing confidence in an employee (see Judgment 4310, consideration 13).

In the present case, considering that the complainant held a permanent appointment and that the sanction of discharge has been annulled, the order of reinstatement is possible and appropriate. The complainant will be reinstated with effect as from 8 August 2019.

8. The setting aside of the impugned decision and of the sanction of discharge, and the reinstatement of the complainant, require that the case be sent back to the organization. It will be a matter of the organization to determine whether the complainant is charged afresh or whether a sanction is to be determined by reference to the charges as originally formulated and on the basis that his guilt has been established.

9. As to the claim for compensation of material damages, the Tribunal deems that the complainant is entitled to an award of material damages, to be quantified based on the salary to which he was entitled at the date of his discharge. The salary is owed with retroactive effect as from 8 August 2019 and up to the date of effective reinstatement. The organization shall pay the complainant the equivalent of the salary and various indemnities, net of any income from other employment received as from the date of the discharge and until the date of effective reinstatement and should restore his pension rights. All these amounts shall bear interest at the rate of 5 per cent per annum as from the date on which they fell due until the date of their payment.

10. The claim for moral damages shall be dismissed as the complainant does not provide sufficient evidence for them.

11. The further claims that the Tribunal quash the measure of suspension with full pay, the decision to immediately replace the complainant and the announcement made to all staff that he was "no longer" with the Global Fund are either unfounded or irreceivable for the reasons given below and will be dismissed.

The suspension with full pay was, in the circumstances of the case, an interim measure aimed at covering the time span between the adoption of the 8 May 2019 decision and the date of 8 August 2019, when the discharge became effective. According to the Tribunal's case law, the suspension of an official is a provisional measure, which in no way prejudges the decision on the substance of any disciplinary measure against her or him. However, as a restrictive measure on the staff member concerned, the suspension must have a legal basis. In this case, it does. According to the Employee Handbook "[i]n case of allegations of gross misconduct or where such measure is justified in the interest of the Global Fund, an employee may provisionally be suspended from service, pending the outcome of an investigation. The suspension shall be decided by the Head [of the] Human Resources Department, after consultation with the relevant Division Head and the Legal Department."

The claim for annulment of the decision to immediately replace the complainant is irreceivable as, in any case, it is not a final decision within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal.

The claim for annulment of the announcement made to all staff that the complainant was "no longer" with the Global Fund is irreceivable as this announcement is not a final decision within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal.

12. The further claims for an apology and for declarations of law must be rejected as the first one is beyond the competence of the Tribunal (see Judgment 4478, consideration 4) and the second one is irreceivable (see Judgment 4246, consideration 11).

13. The complainant is entitled to costs, which the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision, as well as the 8 May 2019 decision of discharge, are set aside.
2. The Global Fund shall reinstate the complainant with effect as from 8 August 2019.
3. The case is sent back to the Global Fund for a new decision as indicated in consideration 8 above.
4. The Global Fund shall pay the complainant material damages to be determined on the basis of the criteria set out in consideration 9 above.
5. The Global Fund shall pay the complainant 2,000 euros in costs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 21 October 2022, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 28 November 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ