

B.

v.

Global Fund to Fight AIDS, Tuberculosis and Malaria

123rd Session

Judgment No. 3748

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms D. B. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (hereinafter “the Global Fund”) on 24 May 2014, the Global Fund’s reply of 29 September and the complainant’s e-mail of 2 December 2014 informing the Registrar of the Tribunal that she did not wish to enter a rejoinder;

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 Global Fund’s decision to withdraw an offer of employment allegedly made to her by the Global Fund’s Chief Procurement Officer.

The complainant is a former staff member of the Global Fund. She joined the Global Fund on 15 March 2010 as a Senior Manager, Procurement Relationships. On 21 March 2012 she was informed, by a letter dated 19 March 2012, that following the recent restructuring of the Global Fund’s secretariat, her position would be abolished. She was invited to participate in internal selection processes to fill vacant positions within the Global Fund’s secretariat but she was also told that, unless she was appointed or reassigned to another position, she would be separated

from the Global Fund. The parties initiated negotiations for a Mutually Agreed Separation settlement but these did not prove successful.

In the course of 2012 the complainant applied for vacant positions without success. One of these positions was that of Head, Transition Team, Grant Management (vacancy IRC1425). The complainant submitted her application in November 2012 but it was not successful and in January 2013 she filed a formal grievance with the Human Resources Department (HR) challenging the decision not to shortlist her for this vacancy. Her grievance was rejected and in April 2013 she filed an appeal which was ultimately dismissed by the Global Fund's Executive Director, further to the Appeal Board's recommendation.

Around the same time that she commenced a grievance process in relation to her application for vacancy IRC1425, the complainant was approached by Mr G., the newly appointed Chief Procurement Officer, to discuss a possible role for her in the Procurement Department and there were several e-mail exchanges between the complainant and Mr G. In the initial e-mail exchanges in January 2013 Mr G. told the complainant that he could work with her to create a rewarding role that made best use of her skills and that, if she had the will, he had the role. However, in subsequent e-mail exchanges in early February he told her that he had been informed that she was pursuing a grievance with HR and was not sure how to proceed until she resolved any outstanding issues. Finally, by an e-mail of 18 February 2013, he informed her that, as he had started to develop his team and "geared up for transformation", it had become clear to him that he would not be able to create a role for her in the Procurement Department.

On 14 May 2013 the complainant filed another formal grievance with HR, this time "in relation to the Senior Manager position in the Procurement team that was offered to [her] and was subsequently withdrawn" (second grievance). She argued that the offer made to her by Mr G. was withdrawn in retaliation for her pursuing a grievance in relation to her application for vacancy IRC1425, that the Global Fund had made no attempt to seek alternative employment for her and that it had in fact actively obstructed her reassignment. She sought measures to address the damage caused to her reputation, moral damages and

material damages equal to the full salary, benefits and allowances that she would have received had she remained a Global Fund employee until retirement age, or until such time as she secured alternative employment. Following the rejection of this second grievance, she filed an appeal with the Appeal Board on 9 August 2013 contesting: (i) the decision not to map her position in the new organisational structure; (ii) the Global Fund's failure to apply its policies and procedures during restructuring in a fair manner, including those regarding grievances, a fact which resulted in material disadvantage for her and unequal treatment; (iii) the decision to withdraw the offer of employment made to her by Mr G. in retaliation for having filed a grievance; (iv) the decision not to offer her tax equalisation on repatriation. She sought the same redress that she had sought in her second grievance. With effect from 31 August 2013, she separated from the Global Fund on the ground that her position had been made redundant.

After holding a hearing, the Appeal Board issued its report on 20 February 2014 considering the appeal receivable only to the extent that it concerned the alleged withdrawal of an offer of employment made to the complainant by Mr G. and the alleged unfair application by the Global Fund of its grievance policies and procedures. On the merits, the Appeal Board found that the discussions between Mr G. and the complainant had remained exploratory and that no concrete employment offer had been made to her and, by extension, no such offer had been withdrawn. The Appeal Board did not find sufficient evidence to support the complainant's allegations of retaliation nor concrete evidence that the Global Fund's grievance policies and procedures had been applied in an unfair manner and it recommended that the appeal be dismissed. By a letter of 27 February 2014, the complainant was notified of the Executive Director's decision to follow the Appeal Board's recommendation. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to award her moral and material damages, the latter in an amount equal to the full salary, benefits and other allowances that she would have received had she remained a Global Fund employee until the normal retirement age or, alternatively, until such time as she obtained equivalent

employment, less any sums received from other employment sources. She claims compensation for the damage caused to her reputation and costs in relation to her complaint before the Tribunal.

The Global Fund asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant commenced employment with the Global Fund in March 2010 and separated on 31 August 2013. During this period, her substantive position was Senior Manager, Procurement Relationships. In January and February 2013, the complainant engaged in discussions with the newly appointed Chief Procurement Officer who was Head, Procurement, about securing a position in the Procurement Department in circumstances where the complainant had earlier been advised, in March 2012, that the position she then held was to be abolished as a result of a review of the organisation's structure by the newly appointed General Manager.

2. The complainant seeks an oral hearing but the Tribunal is satisfied that the complaint can fairly and reasonably be determined by reference to the written material provided by the parties.

3. Central to the complainant's case in these proceedings, is that she was the subject of unlawful retaliation. The retaliation was said to be manifest in an e-mail from the Chief Procurement Officer dated 5 February 2013:

"I have spoken with [the Senior Adviser, HR Policy and Employee Relations] and he has told me that you are pursuing a grievance with the Fund. While he did not share any detail, I am not sure how I can progress until you resolve any outstanding issues."

The reference to "a grievance" was a reference to a complaint the complainant had lodged within the organisation in January 2013 arising from her unsuccessful application for the position of Head, Transition Team (vacancy IRC1425). In the complaint the complainant alleged breaches of the organisation's recruitment and selection rules.

4. The complainant alleges that in the discussions in early 2013 with the Chief Procurement Officer she had been offered a position in the Procurement Department and that the e-mail of 5 February 2013 reflected a withdrawal of that offer particularly when taken together with subsequent discussions later in February 2013. This proposition is contested by the Global Fund in its pleas and it argues no offer was or could have been made by the Chief Procurement Officer. Whether a formal or informal offer had been made is really immaterial though it is clear from the e-mail chain preceding the e-mail of 5 February 2013 that the Chief Procurement Officer was interested in the complainant securing further employment in the Procurement Department and was both supportive and positive in his tone. The reason why it is immaterial whether an offer of employment had been made is because the Tribunal is not satisfied that the complainant has demonstrated that the conduct of the Chief Procurement Officer or, for that matter, the Senior Adviser, HR Policy and Employee Relations or any other official in the Human Resources Department was motivated by malice or any other improper or inappropriate reasons such as to constitute unlawful retaliation.

5. The complainant's allegation of retaliation arising in these proceedings was the subject of an internal appeal considered by an Appeal Panel (the Panel) of the Office of the Appeal Board and the subject of a report dated 20 February 2014. In its report, the Panel noted an argument of the Global Fund that the Head, Procurement had "no desire of retaliation". The Panel also noted that it interviewed the Head, Procurement and also the Head, Human Resources. In relation to the complainant's allegation of retaliation the Panel said "[it] did not find sufficient evidence to support the allegation".

6. It is incumbent on the complainant to establish that the actions or conduct complained of was retaliatory (see Judgment 3415, consideration 11), though it can be accepted that evidence of personal prejudice is often concealed and such prejudice can be inferred from surrounding circumstances (see Judgment 1775, consideration 7). The conclusions of the Panel should be accorded weight by the Tribunal. Moreover it is inherently unlikely in the circumstances that the Head,

Procurement suddenly and somewhat dramatically switched from a position of support and encouragement towards the complainant to one of antipathy because he had been informed the complainant had an unresolved grievance with the organisation.

7. Indeed it is clear from the e-mail of 5 February 2013 that the substance of what the Head, Procurement was saying was that further discussions between him and the complainant should await the resolution of the grievance. While, in that e-mail, he says he was unaware of the details of the grievance, it can be inferred that he understood it related to the complainant's employment status within the Global Fund. It was entirely reasonable to adopt the approach that any further discussion about employment in the Procurement Department should await resolution of the grievance.

8. The complainant has not demonstrated that the Global Fund engaged in unlawful retaliatory conduct towards her and, accordingly, her complaint should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 19 October 2016,
Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ