

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**F.**

**v.**

**Global Fund to Fight AIDS, Tuberculosis  
and Malaria**

**139th Session**

**Judgment No. 4914**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. F. against the Global Fund to Fight AIDS, Tuberculosis and Malaria (“the Global Fund”) on 28 January 2022 and corrected on 11 March 2022, the Global Fund’s reply of 13 July 2022, the complainant’s rejoinder of 14 October 2022 and the Global Fund’s surrejoinder of 16 January 2023;

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 decision to close the investigation concluding that certain allegations against him were substantiated and to postpone the initiation of disciplinary proceedings until such time as he might be in a position to participate in such proceedings.

The complainant is a former employee of the Global Fund. He joined the Global Fund on 13 September 2010 and he separated from it on 3 October 2021, when his appointment was terminated following a redundancy process. At the time of the events giving rise to the present complaint, he was a Senior Disease Coordinator, HIV Technical Advice and Partnerships Department Strategy, Investment and Impact Division.

In December 2019, the Global Fund received complaints alleging that the complainant had engaged in inappropriate behaviour and comments. It was decided to initiate an investigation into these allegations and an external investigative firm was engaged to this end. The complainant was relevantly informed by a letter of 22 January 2020.

The complainant submitted a medical certificate, dated 22 January 2020, confirming that he was not fit for work due to “work related stress”, and was placed on sick leave with immediate effect. The complainant’s sick leave was subsequently extended several times up until his separation from service on 3 October 2021.

On 7 May 2020, the Human Resources Department (HRD) informed the complainant that the investigation would be extended so as to give him the opportunity to participate in it and to meet with the investigators. HRD requested the complainant to notify it whether he intended to participate in the investigation or not. On 8 May 2020 and 15 June 2020, the complainant’s treating physician informed the Head of HRD that the complainant was unable to engage in any investigation, because of his health condition, and that it would take several months for him to recover to a point that he could fully engage in any work process.

By an email of 3 July 2020, HRD informed the complainant that the investigators had submitted a draft investigation report, based on the information they were able to collect during the investigation, and that some of the allegations against him were substantiated. Attached to the email, HRD provided the complainant with a copy of the draft investigation report and it invited him to submit his comments thereon by 20 July 2020.

On 19 July 2020, the complainant responded that he profoundly disagreed with the process undertaken by the Global Fund and that it was inconceivable that investigators could produce a report which fully or partially upheld allegations against him, without ever having spoken to him. Maintaining that he was too ill to participate in the process, he requested that the investigation be suspended pending his recovery and full participation in it.

On 3 August 2020, the Head of HRD informed the complainant that, pursuant to its duty of care, the Global Fund was compelled to investigate claims of harassment and to bring investigation procedures to closure within a reasonable time. More than six months had passed since the complainant had been informed that an investigation had been initiated and the investigation process could not be put on hold indefinitely. Noting that the Global Fund had to achieve a reasonable balance between its duty to ensure due process and its duty to implement the applicable rules, the Head of HRD offered the complainant two options: to participate voluntarily in the investigation process or to submit a medical certificate from his treating physician stating that his state of health did not allow such participation, in which case the investigation would be duly completed based on the case file as it stood, findings would be made as supported by the available evidence, no adverse inferences would be made from the complainant's lack of participation in the process and the complainant would subsequently be informed of the next steps.

On 17 August 2020, the complainant's counsel informed the Head of HRD that he was mandated to represent the complainant in all employment related matters and that neither of the options offered in the 3 August 2020 letter were acceptable. Considering that a decision to close the investigation process and to take potentially adverse decisions against the complainant, without giving him the right of defence, would grossly violate his due process rights, the complainant's counsel requested that the investigation be suspended until the complainant was medically fit to participate in it. The complainant's counsel also informed the Head of HRD of the complainant's preparedness to discuss a mutually agreed separation.

In a letter of 8 September 2020, the Head of HRD responded that, although the applicable rules did not allow for legal representation in the investigation process, he had exceptionally decided to grant the complainant's wish to be represented by counsel. The Head of HRD took note of the complainant's rejection of the two options offered to him on 3 August 2020, but expressed the view that the complainant's incapacity to work did not establish his incapacity to provide comments

on the investigation report, especially since he was assisted by counsel. Referring to the Global Fund's obligation to strike a balance between its duty to ensure due process and its duty to respect its applicable rules, the Head of HRD informed the complainant that the investigation would be closed on 16 September 2020 and that any comments submitted by the complainant beforehand would be included in the case file. Lastly, the Head of HRD indicated that an offer for a mutually agreed separation could be submitted on behalf of the complainant for the Global Fund's consideration.

Under cover of a 17 September 2020 letter, the complainant's counsel forwarded to the Head of HRD a medical certificate of 10 September 2020, in which the complainant's treating physician attested to the complainant's inability to engage meaningfully in any investigation process and indicated that, if allowed to recover without interruption, the complainant might be ready to engage in such process in January 2021. In this letter, the complainant's counsel indicated that his current mandate was only to assist his client in communications with the Global Fund, and not to defend him against the misconduct allegations, and that an offer for a mutual separation would be submitted in due course when his client's health permitted.

By a letter of 8 October 2020, the Manager and Deputy Head of HRD informed the complainant, through his counsel, that the investigation had been completed and notified him of the outcome, according to which, out of the six allegations received, two were found to be substantiated (speaking to people in a humiliating manner, creating a hostile work environment within the team), two were found to be partially substantiated (making belittling comments, creating fear of retaliation), and two were found not to be substantiated (shouting at staff in front of others and in the open space, discussing staff performance with others). The Manager and Deputy Head of HRD explained that, owing to its duty of care, the Global Fund could not indefinitely extend the closure of the investigation and that the conclusions reached by the investigator were based on the information obtained, but not discussed with the complainant, who had declined the invitations to comment on the draft investigation report on the basis that he was unable to participate

in the investigation process. They noted that, although the complainant had been granted exceptional leave to involve his counsel in this process, the latter had refrained from commenting on his behalf. Considering the complainant's medical certificate of 10 September 2020, the Manager and Deputy Head of HRD informed the complainant of the decision to postpone the review of the case for any potential disciplinary proceedings until such time as the complainant might be in a position to participate in such proceedings, adding that any issues that were found to be substantiated and/or partially substantiated would be reviewed upon such time.

On 17 November 2020, the complainant's counsel submitted a request for informal resolution of the dispute but this was rejected on 25 November 2020. On 5 January 2021, the complainant's counsel submitted a request for resolution contesting the Global Fund's decision of 8 October 2020. The Head of HRD rejected this request for resolution on 1 March 2021, further to which the complainant's counsel submitted an appeal on 15 April 2021, asking for (i) the setting aside of the decision to "close the investigation" and to "find him culpable of misconduct without his participation"; (ii) the suspension of the investigation until such time as the complainant's health allowed him to participate in an interview and put forward his defence; (iii) 100,000 Swiss francs in moral damages and exemplary damages in the same amount; (iv) 15,000 Swiss francs in costs; (v) interest at the rate of 5 per cent per annum on all amounts awarded; and (vi) such other relief deemed necessary, just and fair.

In its report of 18 October 2021, the Appeal Board concluded that the appeal did not fulfil the requirements of receivability, because it was not directed against an administrative decision adversely affecting the complainant's legal situation or his terms and conditions of employment. It therefore recommended that the appeal be rejected as irreceivable.

By a letter of 1 November 2021, the Executive Director informed the complainant's counsel that he had decided to fully endorse the Appeal Board's conclusions and recommendations, and thus to reject his appeal as irreceivable. This is the impugned decision.

The complainant asks the Tribunal to set aside the decision to close the subject investigation, which was conducted without the complainant's participation due to his illness, and to also set aside the resulting implied decision to find him culpable of misconduct with all legal effects flowing therefrom, as if said investigation was never conducted. He also asks to permanently remove from his personnel file any and all documentation or references to said investigation and to permanently bar the Global Fund from communicating any information or documentation about said investigation, or its implied findings, to any party internal or external to the Global Fund. The complainant claims moral damages in the amount of 150,000 Swiss francs, exemplary damages in the amount of 150,000 Swiss francs, and costs in an amount of not less than 20,000 Swiss francs. He also claims costs in respect of the internal appeal, given his exceptional circumstances caused by his sickness and absence on sick leave. He seeks interest at the rate of 5 per cent per annum on all amounts awarded for the period from January 2020 through the date all such amounts are paid in full and he also seeks such other relief as deemed fair, just, and necessary.

The Global Fund asks the Tribunal to dismiss the complaint as irreceivable and, on a subsidiary basis, as unfounded in its entirety.

### CONSIDERATIONS

1. By his complaint of 28 January 2022, the complainant impugns before the Tribunal the decision of the Executive Director of the Global Fund rendered on 1 November 2021, whereby the executive head of the organisation fully endorsed the conclusions and recommendations of the Appeal Board dated 18 October 2021, dismissing as irreceivable the complainant's appeal challenging a prior decision of the Manager and Deputy Head of the Human Resources Department (HRD) dated 8 October 2020.

In the latter decision, the complainant was notified, on the one hand, of the outcome of an investigation initiated on 22 January 2020 into allegations of inappropriate behaviour on his part likely to have caused a hostile work environment and of inappropriate comments that

he purportedly made, and, on the other hand, of the decision of the organisation to postpone the review of the case for any potential disciplinary review until such time as he may be able to participate in the proceedings.

The Tribunal observes in this regard that the complainant had been allegedly on service-incurred sick leave since 22 January 2020 due to work-related stress, that he did not resume work after that date, and that, in the end, he was separated from service on 3 October 2021.

2. The complainant has requested oral proceedings. However, as the submissions and documents produced by the parties are sufficient to enable the Tribunal to resolve the issues raised in this complaint, the request is rejected.

3. The main relief claimed by the complainant before the Tribunal is to set aside “the decision to close the subject investigation” and what he refers to as “the resulting implied decision to find [him] culpable of misconduct without his participation due to his service incurred illness”.

It should, however, be noted at the outset that the record does not support any assertion that “an implied decision to find the complainant culpable of misconduct” ever resulted or existed. On the contrary, the decision of 8 October 2020 expressly confirmed that no disciplinary proceedings were to be taken because of the investigation until such time as the complainant was able to participate in such proceedings, and this, in fact, never materialized. In its reply, the Global Fund aptly responded on this point, effectively submitting that it is indeed quite disingenuous of the complainant to make such a suggestion that misrepresents the facts, since no disciplinary action was taken and no disciplinary procedure was even initiated.

The Tribunal will therefore ignore this aspect of the main relief claimed.

4. The additional relief sought by the complainant before the Tribunal includes requests that all documents and references concerning the investigation at the centre of the dispute be permanently removed from his personnel file, and that the organisation be permanently barred from communicating anything to anyone about this investigation. The Tribunal notes in this respect that the internal appeal filed by the complainant did not contain such requests. Actually, it rather included a separate demand, not made in the present complaint, that the investigation be suspended until such time as his health would allow him to participate and put forward his defence.

As for the monetary relief the complainant seeks before the Tribunal, it stands at 150,000 Swiss francs respectively for moral and exemplary damages. Conversely, in the internal appeal process, these figures were rather limited to 100,000 Swiss francs respectively. The record does not point to any explanation of the reasons for the increase of these amounts between the date of the filing of the internal appeal, on 15 April 2021, and the date of the introduction of the complaint before the Tribunal, on 28 January 2022.

5. In support of these claims, the complainant first submits that both the Executive Director, in the impugned decision, and the Appeal Board, in its report, were mistaken to conclude that his appeal was not receivable. In his view, his appeal was properly directed against an administrative decision that affected his terms and conditions of employment.

Second, the complainant submits that the Global Fund disregarded his due process rights by closing the investigation, despite his uncontested inability to participate in such due to illness – as duly established by the relevant medical certificates and reports submitted – which, according to him, was service incurred. He adds that, in so doing, the Global Fund violated the principle of good faith and its duty of care towards him.

6. The Global Fund raises objections to the receivability of the complaint as a threshold issue on two grounds.

First, it argues that the complaint is irreceivable in its entirety, since the complainant has failed to turn against a challengeable decision, and prematurely lodged his appeal against a mere step in a fact-finding process, which, in any event, eventually led to no disciplinary action.

Second, it maintains that the complaint is also irreceivable in part, since the complainant has not exhausted the internal means of redress available to him under the applicable rules, particularly regarding his new claims for the removal of all documents or references concerning the investigation from his personnel file and for the defendant to be barred from communicating any information about it. In addition, the Global Fund argues that the same is true as well for the significant increase of the monetary claims that must, as a result, be regarded as new claims.

On the merits, the Global Fund categorically denies any alleged violation of due process rights or of its duty of care in this matter.

7. In the impugned decision, the Executive Director endorsed the findings of the Appeal Board to justify his own conclusion that the complainant's appeal was not receivable. In its report, the Appeal Board noted that, to be receivable, the appeal had to be directed against an administrative decision that adversely affected the complainant in an individual manner. It added that under the relevant provisions of the Global Fund Employee Handbook, the objective of an investigation was to conduct a fact-finding inquiry into allegations relating to potential misconduct, that its sole objective was to determine facts and that it was not a punitive undertaking. The Appeal Board found that under the Global Fund's own rules, an investigation was an administrative tool and a prerequisite to the initiation of a disciplinary process and, as such, neither its conduct nor its closure had a direct impact or a legal effect on the employment situation of the complainant.

Relying on the Tribunal's case law, the Appeal Board concluded that the decision to close the investigation did not amount to a decision affecting the rights of the complainant such that it could be challenged at that stage. It emphasized that the Global Fund had not taken any decision yet on a possible disciplinary measure.

8. The complainant contends that the decision to close the investigation, as contested in the present complaint, was not a mere step in the decision-making process but a final decision that had a legal effect on him in that it will be part of his personnel file permanently. He adds that, since this decision contained allegedly substantiated, or partially substantiated, allegations against him, it had a negative legal effect on him and, thus, it was a challengeable decision and its challenge was not premature. According to him, due to his peculiar circumstances, there was no subsequent final decision taken after the 8 October 2020 decision, and there will indeed be no other final decision by the Global Fund through which he will ever be able to contest the findings of the investigation.

9. A decisive and central feature of the complainant's argument on the receivability issue is the reference he makes in his brief to provisions of the Employee Handbook that he expressly cites at length in support of the position that this handbook granted him precise rights prior to the completion of the investigation. But the Tribunal observes that the provisions the complainant refers to in this respect are not the ones that were applicable in January 2020 when the fact pattern relevant to this case unfolded. The relevant provisions of Annexes IX, Investigations, and XII, Disciplinary Procedure, of the Employee Handbook were actually amended as of 6 January 2020, and they contained a different language than the one relied upon by the complainant in his brief.

In this respect, as the Global Fund relevantly pointed out in its reply, Annex IX of the Employee Handbook provided notably that an investigation is not a punitive undertaking, that it is conducted with the sole objective of determining the facts, and that it may, but not necessarily will, entail further steps if and when the allegations are substantiated in whole or in part.

10. The Tribunal considers that there is a fundamental difficulty in much of the substance of the grievance that the complainant seeks to pursue in the present complaint. He cannot point to an enforceable claim which can be vindicated by the process introduced before the Tribunal. The subject matter, namely the decision of the Global Fund

to close its investigation on alleged misconduct, does not, without more, adversely affect the complainant.

In Judgment 4475, consideration 6, the Tribunal recalled that: “The Tribunal’s case law distinguishes between final decisions and other procedural steps leading to a final decision. Ordinarily, the process of decision-making involves a series of steps or findings which lead to a final decision. Those steps or findings do not constitute a decision, much less a final one. They may not be attacked directly before the Tribunal, but they may be impugned as part of a challenge to the final decision (see, for example, Judgments 2366, consideration 16, 3433, consideration 9, 3512, consideration 3, 3860, considerations 5 and 6, 3958, consideration 15, and 3961, consideration 4).”

In Judgment 3236, consideration 11, the Tribunal furthermore noted that “[a]buse of authority in relation to the initiation of an investigation may, if proven, taint a final decision taken based on the results of that investigation; however, it must be challenged in the context of that decision”, and it also relevantly stated that “[s]imilarly, an allegation of a breach of the right to due process in an adversarial proceeding must be brought in the context of the final decision arising from that proceeding”.

And in a factual setting that bears resemblance to the present situation, in Judgment 4814, consideration 7, the Tribunal underlined that “it is well established in the Tribunal’s case law that procedural steps taken in the course of a process leading to a final decision cannot be the subject of a complaint to the Tribunal, though they may be challenged in the context of a complaint directed against that final decision (see Judgments 4704, consideration 5, 4404, consideration 3, 3961, consideration 4, 3876, consideration 5, and 3700, consideration 14). In the present case, the refusal to act on the request for the [Internal Oversight Service (IOS)’s] divestiture is part of the process leading to a decision resulting from the investigation report (see, for a similar case, Judgment 3958, consideration 15). Accordingly, any alleged irregularities in the investigation could only be raised in the context of a complaint directed against the outcome of the disciplinary proceedings initiated against [the complainant], provided that she first exhausted the internal

remedies available to her, as required by Article VII, paragraph 1, of the Statute of the Tribunal.” (See also Judgment 4861, consideration 14.)

11. The Tribunal considers that the decision of the Global Fund to close the investigation did not affect the complainant’s legal situation, either by changing his status or even by making any kind of statement in this regard, and this measure did not constitute, as a result, an “administrative decision” concerning the complainant (see Judgment 2364, consideration 4). The Executive Director was quite right, therefore, to follow in the impugned decision the recommendation of the Appeal Board and to consider the complainant’s internal appeal irreceivable.

From that standpoint, the Tribunal notes that the complainant’s assertion that the investigation could somehow be considered as a stand-alone process, independent and detached from the disciplinary process or measures that it may lead to, is wrong and represents a misguided approach to the factual reality of this matter. The investigation at issue was clearly part of a process that could culminate, if anything, in a disciplinary process and, ultimately, in a disciplinary measure. At the moment the investigation was closed as it was, that process was, and still is indeed, incomplete. In light of this, the investigation cannot be considered in isolation simply for the sake of argument. This is even more true in a context where, like here, the Global Fund expressly stated that these future steps in terms of disciplinary review or process would not take place until the complainant was in a position to participate, and thus implicitly but necessarily, was able to present his position, his contestation and his defence, in accordance with his due process rights that were here, in essence, acknowledged by the Global Fund.

While the opening of a disciplinary procedure could have exposed the complainant to a potential disciplinary measure, such procedure would, at the same time, have afforded him specific procedural safeguards. And, in the event that his legitimate interests would have been affected, he would not have been vulnerable to an arbitrary act by the Administration given the possibility of filing an appeal at the end of the disciplinary procedure.

In the present case, the decision to close the investigation had no adverse effect on the complainant in itself, as no decision was made regarding either a disciplinary procedure or a disciplinary measure. Without the possibility, as established by the record, of ever seeing a disciplinary process, let alone a disciplinary measure, as a result of this investigation, the complainant is unable to substantiate any adverse effect other than mere speculations as to what one could infer from the existence of this investigation report in his personnel file. And contrary to these speculations, the record is clear about the fact that the complainant did not have the opportunity to comment upon the report because of his illness, and that he strongly denied the allegations against him, such that this investigation report could certainly not be considered by anyone as a complete and final assessment in and by itself. This is precisely what the Global Fund indeed emphasized in its letter of 8 October 2020.

12. As a result, the Tribunal considers that, similarly to the internal appeal filed by the complainant, the current complaint is irreceivable, since the impugned decision to close the contested investigation is merely a step in a process outside the context of the disciplinary process or measure that it may lead to – which, in this case, will most likely never happen – and certainly not a challengeable administrative decision within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal.

13. Even though it is not strictly necessary to do so given the finding that the complaint is irreceivable in its entirety, for the sake of completeness, the Tribunal will add the following regarding the merits of the arguments raised by the complainant. The Tribunal observes that, in the circumstances relevant to the complainant's situation, the Global Fund had to reconcile many conflicting obligations.

On the one hand, it was bound to complete the investigation process within ninety days under the applicable provisions of the Employee Handbook, and, from an operational standpoint, the Tribunal accepts that it could not retain indefinitely the service of the appointed external investigator but had to close the matter at some point. In other words,

the Global Fund could not realistically put on hold an investigation of this nature indefinitely.

On the other hand, it also had a duty of care towards the staff members who had reported the allegations of misconduct raised against the complainant to carry out the investigation diligently (see, in this respect, Judgment 4344, consideration 3).

Finally, the Global Fund had a duty to safeguard the complainant's due process rights during the investigation as well as a duty of care towards him. A review of the record indicates that it did take many steps to fulfil these duties. In this regard, it duly notified the complainant of the initiation of the investigation process, it granted an exceptional extension of the investigation process in view of the complainant's absence for health reasons, it proposed alternative ways of meeting more easily with the investigator, and it afforded opportunities to the complainant and his counsel to comment on the draft report as well as additional time to comment on the report. In addition, when the Administration informed the complainant of the outcome of the investigation, it made it very clear that it was to be noted that the outcome had not been discussed with him, as he had not participated in the investigation. It had indeed been indicated before that no adverse inferences would be drawn from his lack of participation in the investigation due to his health condition.

In notifying the complainant of the outcome of the investigation, the Global Fund furthermore emphasized that any future assessment of the case for potential disciplinary review would be postponed until the complainant was in a position to participate in the proceedings. As such, it is undisputed that before the closing of any disciplinary proceeding, the complainant would have been able to submit his comments, in accordance with the procedures set forth in Annex XII of the Employee Handbook.

In the Tribunal's assessment, bearing in mind that adversarial proceedings would still have been ensured before the issuing of a final decision in a disciplinary process, in accordance with the Tribunal's case law (see, for example, Judgment 4313, consideration 6), the Global Fund managed to maintain a reasonable and proper balance

between conflicting requirements and it did not violate the due process rights of the complainant in acting as it did, or its duty of care.

At this juncture, the Tribunal observes that the complainant is mistaken to suggest that he was entitled to participate in the investigation in such a way that he could have, for instance, questioned or cross-examined himself, or through counsel, the persons that the investigator met at that stage of the process. The Tribunal's case law does not support such an extensive right to an adversarial procedure at the investigation stage of the process as the complainant appears to be suggesting (see, for example, Judgment 4770, consideration 6).

Overall, the Global Fund's alleged violation of the complainant's due process rights or of its duty of care has not been established and must be dismissed. As for his monetary claims, being derived from main claims that are unfounded, they must also be dismissed.

14. In the result, the Tribunal concludes that the complaint is both irreceivable and unfounded. It must accordingly be dismissed in its entirety.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

JACQUES JAUMOTTE

CLÉMENT GASCON

MIRKA DREGER