

## NINETIETH SESSION

*In re Diouf*

**Judgment No. 2007**

The Administrative Tribunal,

Considering the complaint filed by Mrs Danièle Diouf against the International Federation of Red Cross and Red Crescent Societies (IFRC hereinafter referred to as the "Federation") on 14 January 2000 and corrected on 22 March, the Federation's reply of 29 May, the complainant's rejoinder of 5 July and the Federation's surrejoinder of 11 August 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Swiss national born in 1947, took up employment at the Federation on 1 May 1985 as a secretary in the Human Resources Department. She was subsequently assigned to a post as administrative assistant in the Refugees and Displaced Persons Department. Her performance appraisal form for the 1993-1994 period showed her work to be generally satisfactory.

In a letter of 27 January 1995 the Director of the Human Resources Department informed the complainant that following restructuring of the Secretariat she was to be assigned to a new post. In a letter of 30 May the acting Director of the same Department told her that the Federation had been unable to find her a new post. Nevertheless, it undertook to maintain her in employment if her services continued to be satisfactory. She was also informed that she would soon be temporarily assigned to the post of secretary to the Head of the Planning Unit. On 23 August the Director wrote to the complainant to tell her that she had been appointed to the post of secretary in the Principles and Policy Unit as of 1 September 1995. Shortly thereafter, her appointment with the Planning Unit was confirmed; she thus split her time at work between the two units. The complainant's performance appraisal report of 18 September 1996 and 30 September 1997 showed that, on the whole, she was carrying out her new duties satisfactorily but that she needed to improve the quality of some aspects of her work. The performance appraisal of 30 September 1998, however, rated her below standard in certain tasks. In particular, she was criticised for inattention to detail, and was consequently advised to be especially attentive to that point and to improve the presentation of her work.

On 25 March 1999 the complainant met with her supervisors and the Recruitment Coordinator from the Department of Human Resources to work out an action plan for improving the quality of her work. On 13 April the Head of the Planning Unit sent her a letter which constituted a "formal warning" and informed her that she had three months in which to improve; otherwise the Federation might transfer her or terminate her contract. The complainant was placed on sick leave from 15 April. On 23 April she wrote to the Recruitment Coordinator to tell her that she wished to "contest the [above-mentioned] warning". In particular, she complained about "a deterioration in the atmosphere at work" that had given rise to "unacceptable tensions" which had destabilised her. The Coordinator replied in a letter of 30 April that there was no procedure for appeal against a warning. In a letter of 10 May, the complainant's doctor authorised her return to work as of 17 May with the proviso "that her working conditions should be improved so as to avoid a relapse".

On 16 August 1999 the Secretary General wrote to the complainant to inform her that due to her unsatisfactory performance her employment would be terminated as from 29 February 2000, that is after a notice period of six

months. On 27 August 1999 the complainant appealed to the Joint Appeals Commission against that decision. She indicated her wish to be represented before the Commission by a colleague. By a letter of 26 October 1999 the Co-Chairmen of the Commission informed the complainant that the Commission considered her dismissal warranted and that the Secretary General shared its opinion. That is the impugned decision.

From 17 August 1999 to 14 January 2000 the complainant was on sick leave. In a letter of 7 February 2000 the Director of Human Resources informed her that the notice period had been suspended during her incapacity for work, which meant that it had started to run again on 15 January and would end on 31 July 2000.

B. The complainant contends that the Federation failed to give proper reasons for her dismissal. Its criticisms of her, insofar as they concern "details", are pretexts designed to conceal the wrongful nature of her dismissal. She objects to the way her two direct supervisors behaved towards her and contends that she was placed under "psychological pressure". Indeed, she alleges that her ailments were partly due to the "attacks against her character" by her supervisors, who failed in their duty to respect members of staff and protect their health. She adds that she was not heard by the Joint Appeals Commission.

The complainant claims the quashing of the decisions of 16 August and 26 October 1999 and compensation equal to twelve months' pay. She also asks the Tribunal to request the Federation to supply her with a certificate of employment stating the nature of her duties and the length of her service and reporting on her performance and conduct. She claims costs.

C. In its reply the Federation explains that under a headquarters agreement with the Swiss Federal Council, it has immunity of jurisdiction and execution. The agreement provides that the Federation shall establish a means of resolving disputes; the Federation has accordingly established in its Staff Rules that any disputes with its employees shall be brought before the Tribunal.

The Federation contends that it gave clear reasons for the unfavourable assessment of the complainant. It states that it has examined the complainant's criticisms of her supervisors and that it attempted to help her to improve. But its efforts failed, so the decision to terminate her contract was "valid and appropriate" and in no way wrongful. It denies that the complainant was subjected to any "psychological destabilisation".

The Federation provides two certificates of employment, dated 20 April 2000, one in a full version, the other in a version dealing only with the nature of her duties and the length of her service. It deems that it has thus fulfilled its obligations in this connection. It asks the Tribunal to award it fair compensation for costs.

D. In her rejoinder the complainant specifies that one of the certificates of employment supplied by the Federation contains a comment about her lack of attention to detail which, in her view, should not appear in such a document. She accordingly changes her claim and asks the Tribunal to invite the Federation to draw up a new certificate excluding the above comment.

E. In its surrejoinder the Federation contends that it cannot be required to remove the comment in question. Indeed, since the complainant had requested a "full certificate", she must accept that it contains remarks about the quality of her work. Only a false assessment or one established in bad faith, could be corrected; such was not the case. Besides, if the comment was removed the certificate would no longer reflect the Federation's opinion, which would be unacceptable.

## CONSIDERATIONS

1. The complainant was recruited by the Federation on 1 May 1985 as a secretary in the Human Resources Department.

From 1992 to 1995 she worked as an administrative assistant in the Refugees and Displaced Persons Department. That post having been abolished as a result of restructuring, on 23 August 1995 she was appointed secretary in the Principles and Policy Unit as from 1 September 1995. Shortly after she was also appointed to the Planning Unit, which meant that she had two first-level supervisors.

Her 1995 professional assessment earned her a performance-related bonus and she was thanked for her efforts.

Her performance appraisal form of 30 September 1998 said that she fulfilled the requirements of her post in some but not all areas. In particular, she was criticised for having made some unfortunate mistakes. She was asked to pay more attention to such details as names, addresses and contact numbers and to the presentation of her work over the following three months.

On 25 March 1999, at a meeting with her two supervisors and the Recruitment Coordinator from the Department of Human Resources, a number of criticisms were levelled at the complainant. The note drafted at the end of the meeting said that she was to be given a written warning. She was also to meet daily with her immediate supervisors to establish priorities and objectives as part of an "action plan" for improvement.

She subsequently had numerous meetings with the Recruitment Coordinator with a view to improving her performance.

On 13 April 1999 the complainant received a formal warning that she must improve within three months, otherwise the Federation might transfer her to another post or terminate her contract. She also received the action plan to help her to improve. On 15 April 1999, however, her doctor ordered her to stop working on medical grounds.

On 23 April 1999 the complainant sent a letter to the Recruitment Coordinator saying that she wished to "contest the warning ... of 13 April". She referred among other matters to "the poor relations in the group to which [she] belong[ed] which [had] led to a deterioration in the atmosphere at work resulting in unacceptable tensions which [had] destabilised [her] ... In [her] opinion, responsibility for this situation [was] shared by the members of the team, which [was] why [she would] not sign this warning".

The Recruitment Coordinator replied, agreeing that it was the responsibility of all parties to promote healthy and cooperative working relations.

The complainant returned to work on 17 May 1999 on the authorisation of her doctor, who indicated "that her working conditions should be improved so as to avoid a relapse".

On 15 July 1999 she was summoned to the Human Resources Department where she was informed of various criticisms of her by her immediate supervisors. At that meeting she was again told that if any other errors of the type noted by her supervisors were made before the end of August, her contract would be terminated.

On 19 July 1999 the complainant went to see the Director of the Human Resources Department to inform her that the situation was becoming unbearable, but that she did not wish to leave the Federation.

The complainant took annual leave from 26 July to 9 August 1999.

On 16 August 1999 she received a letter dismissing her as from 29 February 2000 and informing her that she was relieved of her duties with immediate effect. Since she was subsequently unable to work due to illness, the period of notice was suspended and the date of its expiry was extended to 31 July 2000.

2. On 27 August 1999 the complainant appealed to the Joint Appeals Commission against the decision of 16 August 1999. She asked the Commission to recommend that the Secretary General quash the decision and that she be reinstated in a post that matched the abilities she had demonstrated over fourteen years of service, in conformity with Article 1020.2 of the Staff Regulations. She also asked to be assisted during the procedure by an employee of the Federation.

In a letter of 26 October 1999, the Joint Appeals Commission informed the complainant that it had recommended that the Secretary General confirm his decision of 16 August to dismiss her and that he had followed its recommendation.

That is the decision she is challenging in the present complaint, filed on 14 January 2000.

3. The complainant asks the Tribunal:

- to quash the Joint Appeals Commission's decision of 26 October 1999 and, consequently, the Secretary General's decision of 16 August 1999;

- to order the Federation to pay her compensation equal to twelve months' wages;
- to ask the Federation to supply her with a certificate of employment stating the nature of her duties and the length of her service and reporting on her performance and conduct; and
- to award her costs.

4. In support of her claims, the complainant submits that no reasons were given for the decision of 26 October 1999, and that the decision of 16 August 1999 omits to mention whether the Secretary General explored the possibility of transferring her to a post that matched the abilities she had demonstrated during her fourteen years of service with the Federation.

Citing the Staff Regulations, she asserts that employment may be terminated for unsatisfactory performance only after the employee concerned has received a formal written warning allowing three months for improvement. In her view, the 1998 assessment did not constitute a warning within the meaning of Article 1020.1 of the Staff Regulations; however, the letter of 13 April 1999 did, even if it referred mistakenly to Article 1030.1 instead of Article 1020.1 of the Staff Regulations.

However, the complainant points out that the period of three months coincided with a period during which she suffered from serious health problems, as shown by the medical certificate noting an incapacity for work as of 16 April. Moreover, when he allowed her to start work again, her doctor saw fit to specify that her employer should pay particular attention to her working conditions in order to avoid a relapse. So rather than leaving her to the mercy of her two immediate supervisors, whose treatment of her caused her psychological suffering amounting to an unlawful attack against her character, the Federation ought at least to have taken account of her incapacity for work and state of health and prolonged the "probationary" period proportionately. It should not have summoned her as soon as the period ended - on 15 July 1999 - to inform her of her supervisors' criticisms.

She considers that their criticisms, which focus only on details, are in fact pretexts intended to hide the wrongful nature of the dismissal since, in her view, the Federation has failed to prove that her performance was so poor as to warrant dismissal, especially after fourteen years of satisfactory service.

She concludes from the above that the dismissal notified to her on 16 August 1999 is in breach of the Staff Regulations, and that the behaviour of the Federation amounts to an attack against her character.

5. The Federation contends that both the termination of the complainant's contract and the procedure which led to it are consistent with the rules. It stresses that "neither the new formal warning of 13 April 1999 ... nor the subsequent meetings led to an improvement, and so the decision and letter of 16 August 1999 notifying [her] of the termination of her contract for unsatisfactory performance, was both valid and appropriate".

It adds, in particular, that the time limits were respected: after the warning in the appraisal report of October 1998, a new formal warning was addressed to the complainant on 13 April 1999. Furthermore, to take account of her one month's absence on sick leave following the second warning, the Federation of its own accord prolonged the three-month period; it took and notified its decision only on 16 August 1999.

6. The Staff Regulations of the Federation provide that:

Article 1020.1

"If, after formal written warning allowing 3 months for improvement, a staff member still does not do his/her work satisfactorily or does not maintain satisfactory working relations with the rest of the staff, the Secretary General may transfer him/her to another post within the Secretariat or terminate his/her engagement."

Article 1020.2

"If it appears that the reason the staff member's work is unsatisfactory is that the duties and responsibilities of his/her post are too much for him/her, consideration shall be given to transferring him/her to a post suited to the abilities he/she has shown, if such post is available."

Article 1020.3

"Termination under this regulation shall be subject to 1 month's notice for each year of service (maximum 6 months' notice), to take effect at the end of the appropriate month."

#### Article 1020.4

"A contract cannot be terminated for unsatisfactory performance during the period of 3 months following a formal written warning, where 3 months have been provided for improvement."

#### Article 1020.5

"Staff members whose appointments are terminated under this regulation shall have a right of appeal (see Art. 1110)."

#### Article 1110.1

"Staff members may appeal against a decision to terminate their appointment under Art. 700 (Conduct) or 1030 [*recte* 1020] (Unsatisfactory Performance). Such appeal must be made in writing to the Joint Appeals Commission ..."

#### Article 1420.4

"The appellant may ask another staff member of the Secretariat to represent him/her before the Commission. He/she may not be represented by anyone outside the Secretariat."

7. Consistent precedent has it that a decision to terminate a contract being discretionary, the Tribunal will quash it only if it shows a mistake of fact or of law, or a formal or procedural flaw, or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority or lack of authority by the person taking the decision.

8. Under the provisions quoted above, a contract may be terminated for unsatisfactory performance only after the employee has been served with a formal written warning allowing him or her three months to improve.

That period - which essentially aims at allowing the employee concerned enough time as may be constructively used to correct mistakes, make good shortcomings and improve both behaviour and working relations with other staff members - must cover an effective period of three months during which the employee must be in a position to perform his or her duties correctly and to make full use of his or her abilities.

The Tribunal considers that in this instance the complainant was not in such a position. She was placed on sick leave as from 15 April 1999, that is two days after having received the warning imposing probationary notice of three months. She was authorised to resume her duties fully only as from 17 May 1999, her doctor indicating that it was important "that her working conditions should be improved so as to avoid a relapse". She then took annual leave from 26 July to 9 August 1999.

Obviously, therefore, the complainant was not in a position to improve her performance during the period from 15 April to 17 May 1999, nor during her period of annual leave. That being so, on 16 August 1999 when the decision to dismiss her which refers to the warning of 13 April 1999 was notified, she had not completed the three months of actual service during which she might have shown improvement.

The Tribunal consequently considers that the decision to dismiss her is not in conformity with the material provisions.

9. Moreover, the warning letter of 13 April 1999 stated clearly that unless the quality of her work improved within three months, a decision could be taken to transfer her to another post or terminate her contract.

In the letter addressed to the complainant on 16 August 1999, there is no longer any question of a transfer. And there is nothing in the dossier indicating whether the Federation tried to find her another suitable post as Article 1020.2 of the Staff Regulations requires and as it should have done in view of the fact that she had been on the staff since 1985. She had never received an unfavourable appraisal until September 1998, that is after thirteen years of service and three years after the restructuring exercise which had abolished the post of administrative

assistant that she had held to the satisfaction of the Federation.

The testimonials produced by the complainant, the contents of which are not contested by the Federation, suggest that transfer to another post might have been a better solution and more in line with the duties that an international organisation has towards its employees.

10. The Tribunal also notes that the complainant asked to be represented before the Joint Appeals Commission by an employee of the Federation as Article 1420.4 of the Staff Regulations allows. But no effect was given to this request and no explanation was supplied to the complainant.

11. The conclusion is that the decision to dismiss the complainant was not in conformity with the provisions of the Staff Regulations, and that the Federation was in breach of its duty to treat its employees with respect and dignity and to avoid causing them unnecessary injury.

12. The complainant believes that reinstatement is not possible and asks for twelve months' pay in compensation for material and moral injury. The Tribunal considers that, in view of the circumstances of the case, the compensation which she may rightly claim in redress for all the injury she has suffered should be set at 40,000 Swiss francs.

13. The complainant has requested a certificate of employment stating the nature of her duties and the length of her service as well as the quality of her performance and conduct.

In a letter addressed to the Registrar of the Tribunal on 5 July 2000, she states that the Federation finally established a certificate of employment for her, but that it contains a comment which should not be there. She asks for its deletion.

The Tribunal sees no reason to allow that request, since the certificate of employment has been established in conformity with the provisions of Article 1090 of the Staff Regulations. Moreover, the complainant has produced no evidence to show that the certificate was based on wrong facts.

14. There is no reason to order the hearings requested by the complainant.

15. The complainant is entitled to costs, and the amount is set at 4,000 Swiss francs.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Federation shall pay the complainant 40,000 Swiss francs in compensation for injury under all heads.
3. It shall pay the complainant 4,000 francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

*(Signed)*

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 February 2001.