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

NINETY-THIRD SESSION

Judgment No. 2156

The Administrative Tribunal,

Considering the complaint filed by Mrs A. M. I. against the International Federation of Red Cross and Red Crescent Societies (IFRC, hereinafter the "Federation") on 17 October 2001, the Federation's reply of 30 November 2001, the complainant's rejoinder of 6 March 2002 and the Federation's surrejoinder of 12 April 2002;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Article 1060 of the Staff Regulations of the Federation provides that:

"1060.1 After the end of the probation period, the employer cannot terminate the contract, except for valid reasons:

a) during a partial or total incapacity of work resulting from sickness ... during 180 days from the sixth year of service;

...

1060.2 Notice given during one of the excluded periods in art. 1060.1 shall be void..."

Under Article 1065.2 of the Staff Regulations:

"The notice of termination of the employment relationship by the employer is ... abusive, if it is given:

a) because the employee belongs or does not belong to the Staff Association...

b) during the period the employee is an elected employee representative in a company institution or in an enterprise affiliated thereto and, if the employer can not prove that [there was] a justified motive for the termination."

The complainant, a Swiss citizen born in 1964, joined the Federation in October 1992 as an administrative assistant in the Information Systems Department of the Secretariat in Geneva. She was appointed under a contract of indefinite duration. By a letter of 27 January 1995, the Director of the Human Resources Department informed her that, following restructuring that had taken place, she would be assigned to the post of technical assistant in her Department.

In February 2000, the complainant was elected President of the Staff Association. In this capacity she also acted as co-Chair of the Joint Staff and Management Commission. Between 5 June and 3 September 2000, she suffered total incapacity for work as a result of a herniated disc. She returned to work half-time as from 4 September, after producing a medical certificate dated 28 August. On 13 October she provided another certificate valid for a month.

On 1 September the complainant had been informed by the Director of her Department that the post of technical assistant would be put up for competition, which was done on 4 September. The job description indicated that some of the duties could require "lifting and carrying 20 kilos and perhaps more". On 20 September the complainant

applied for the job, drawing attention to the fact that she had a contract of indefinite duration.

In a letter of 19 September, the Director of the Human Resources Department informed her that the post she currently held would no longer exist in the new structure that was to come into effect on 9 October 2000. By an e-mail of 19 October, the complainant informed the Director that she was withdrawing her application for the post of technical assistant.

In a letter of 21 November, the Director whose title was now Head of the Human Resources Department confirmed that the complainant's position was to become redundant under Article 1030.1 of the Staff Regulations, with effect from 30 November 2000. As there was no other suitable position available within the Secretariat, her contract of employment would be terminated upon expiry of a notice period of six months, that is on 31 May 2001. On 22 November 2000 the complainant submitted a medical certificate of the same date indicating her partial incapacity for work for the period between 4 September and 15 December 2000.

On 4 December, she appealed to the Joint Appeals Commission. She considered that her termination was invalid on the grounds that she had been notified thereof during a period of partial incapacity. She claimed several months salary in compensation. On 21 December, in view of the fact that the complainant had contested the validity of the termination letter of 21 November 2000, the Head of the Human Resources Department sent her another - indicating that her appointment would end on 30 June 2001. The complainant asked the Commission to consider that her appeal was directed against that decision too. When the Head of Human Resources was informed that the complainant had found another job outside the Federation as from March 2001, she sent her a letter on 26 February indicating that the Federation would waive three months of her notice period. It set out the calculation of the lump sum that she would receive upon termination of her appointment, which included a redundancy indemnity equivalent to nine months base salary, as well as three months additional salary.

The Commission issued its report on 9 April 2001. It indicated that the complainant's employment appeared to have been terminated without valid reason during a period of incapacity for work, and that the notice period should not have commenced until 4 December 2000. Furthermore, the Commission found that her termination had been abusive as it had been decided upon while she was President of the Staff Association. On 9 July she was offered two months additional salary in full and final settlement, which she refused in a letter of 12 July. By a letter of 20 July, the co-Chairs of the Commission forwarded the complainant a letter from the Secretary General dated 19 July 2001, which is the impugned decision. In this letter, the Secretary General expressed regret that she had not accepted the above offer, as he did not feel the Federation was able to offer her more than two additional months salary.

B. The complainant submits that she suffered total and then partial incapacity for work between 5 June and 15 December 2000 and that she was in her ninth year of service when informed of her termination. Consequently, under the terms of Article 1060 of the Staff Regulations, her appointment could not be lawfully terminated before 4 December 2000. The notice contained in the letter of 21 November 2000 is therefore null and void.

The complainant adds that she was President of the Staff Association and co-Chair of the Joint Staff and Management Commission when she was informed of her termination. The termination was therefore invalid under the terms of Article 1065.2. Furthermore, the abolition of her post was not a "justified motive" for termination because it was not a reason "inherent in the personality" of the employee. She adds that it was the intention of the Federation to "rid itself" of an employee who was particularly committed to the defence of the staff. Knowing that she could not carry weights in view of her state of health, it had added to the job description a requirement that the technical assistant should be able to carry up to 20 kilos or more. For this reason she had preferred to withdraw her application.

She requests the Tribunal to order the Federation to pay her compensation equivalent to 10 months salary, namely her salary for the month of June 2001, six months salary for "abusive" notice of termination and three months salary for moral damages. She also requests compensation equivalent to the 24 days leave that she was not able to take before her contract was terminated. Lastly, she claims costs.

C. In its reply the Federation contends that, according to her own statements, the complainant resumed work at 100 per cent as from 20 November 2000. It was only on 22 November that she submitted a medical certificate testifying to her partial incapacity for work for the period between 4 September and 15 December 2000. The complainant was not therefore in a period of incapacity when informed of her termination. The notification of

termination of 21 December 2000 is in any case valid.

The Federation submits that, when withdrawing her application for the new post of technical assistant, she only indicated her wish "to take up new challenges".

It argues that her claim for compensation for abusive notice of termination must fail, as the reason for terminating her appointment was the abolition of her post. It cannot be argued that only a reason "inherent in the personality" of the employee can justify the termination of an appointment, since such reasoning is based on Swiss law, which is not a source for the interpretation of the Federation's rules. An economic reason, such as the abolition of a post, can also be a "justified motive" for terminating an appointment. Moreover, if the Federation had intended to rid itself of the President of the Staff Association, it would not have given her the opportunity to continue in her functions despite her termination.

In view of the conditions in which the complainant's appointment was terminated, the Federation wonders whether the claim for the payment of compensation for moral damages is still reasonable. It recalls in this respect that she was allowed to work outside the Federation, even though her period of notice had not been completed, and that she received a double salary for several months etc. On the question of the payment for the leave that she was not able to take, the Federation says that such payment is only possible in the event of immediate termination for valid reasons.

The Federation requests that the complainant be ordered to pay costs.

D. In her rejoinder the complainant contends that the Federation misused its discretion and did not do everything in its power to reassign her. She says that the Federation should have either confirmed her in her post, in view of the fact that her work had always given satisfaction, or proposed an equivalent post under the terms of Article 1030.1. She withdrew her application for the post of technical assistant since the Federation had not respected her dignity.

The complainant explains that she submitted a medical certificate only on 22 November 2000 because her doctor was away when the previous certificate needed renewing. When her appointment was terminated, she was covered by the certificate of 13 October 2000. She emphasises that the Federation never contested her incapacity for work. She adds that her post was not abolished, but merely replaced by an almost identical one. The Federation cannot therefore say that the termination of her appointment was justified by economic reasons, such as the reduction of costs.

With regard to the conditions in which the termination occurred, she contends that the Federation has done nothing but partially apply the Staff Regulations and its normal practice in relation to the abolition of posts.

Lastly, she modifies one of her claims. She says that her outstanding leave for 2000 was in practice 25.5 days. She also considers that she is entitled to 12.5 days leave for the period between 1 January and 30 June 2001. She therefore claims compensation equivalent to 38 days leave.

E. In its surrejoinder, the Federation first argues that the complainant's case was treated with equity and that her interests were respected. It endeavours to show that it did not seek to rid itself of the complainant, nor to harm her dignity. It denies breaching the Staff Regulations.

The Federation reaffirms that the complainant herself announced that she would resume work full-time on 20 November 2000. It had no reason to doubt her word, particularly since she was not covered by a medical certificate at that time. Moreover, the Federation endeavoured to find her a new post within the context of the restructuring.

The Federation says that there is a fundamental difference between the post previously held by the complainant and the one put up for competition. The latter focuses more on the functions of technical assistance. It was for this reason that the requirement concerning the carrying of loads was added.

The Federation contests the receivability of the claim to 38 days of leave, which it in any case deems to be unreasonable.

CONSIDERATIONS

1. The complainant joined the Federation in 1992 as an administrative assistant in the Information Systems Department. In 1995, following restructuring that took place, she was assigned to a post of technical assistant reporting to the Director of the above Department. On 1 September 2000 a meeting was organised between the new Director of the Department, appointed in June, a representative of the Human Resources Department and the complainant. According to the latter, the Director of her Department told her that she would not be confirmed in her post because, as she had been absent when he took up his functions, he had not been able to assess her aptitude for the post. She says he also told her that a new job description had been prepared and that her post would be put up for competition on 4 September. According to the Federation, she was told that her post would be "abolished in its current form" as a result of the restructuring that had been decided upon and that a new post of technical assistant would be put up for competition.

Whatever the real reason for the decision, it is certain that the job description for the new post of technical assistant in the Information Systems Department was forwarded to the complainant and that the post was put up for competition on 4 September 2000. It is also certain that, by a letter of 19 September 2000, the Director of the Human Resources Department informed her that the post she occupied would no longer exist in the new structure, which was to take effect from 9 October 2000. After initially applying for the above post, while reserving her rights under her contract, the complainant informed the Director of the Human Resources Department on 19 October 2000 that she was withdrawing her application. She indicated that reapplying for a post she had held for eight years was not "a very positive move for her future career". She applied for another post, but was not selected.

2. By a letter of 21 November 2000 - which is at the root of the present case - the Head of the Human Resources Department confirmed that the complainant's position had been made redundant under the conditions set out in Article 1030 of the Staff Regulations with effect from 30 November, and that her contract would terminate on 31 May 2001 upon expiry of the notice period. During that period she would receive her normal salary, although she was not expected to report for duties. It was also indicated that, in accordance with Article 1030.4, if the Federation did not provide her with any reasonable offer of employment in the meantime, she would receive a lump-sum payment equivalent to nine months base salary.

3. On 4 December 2000 the complainant filed an internal appeal requesting the Joint Appeals Commission to find that the decision of 21 November was "null and void". She emphasised that, as she had been incapacitated for work from 5 June 2000, she should not have been notified of her termination before the expiry of the protection period of six months, which means not before 4 December. She argued that the six-month period of notice could not commence before that date and that her contract should not therefore expire until 30 June 2001. Citing Article 1065.2, she also claimed that the notice of termination was "abusive" since, as President of the Staff Association and, in that capacity, co-Chair of the Joint Staff and Management Commission, she was protected against any unjustified termination of her appointment. On this basis, she claimed an amount equivalent to six months salary. She requested that her termination allowance be calculated on the basis of the last salary that she would have received at the end of her notice period and that her leave not be deducted from the period of notice. Lastly, she claimed payment in cash of the amounts due in respect of her leave.

4. By a letter of 21 December 2000, the Head of the Human Resources Department confirmed the complainant's termination. She indicated that, if for any reason the decision of 21 November was deemed null and void, this letter constituted a new decision and that, in such a case, the final date of the contract would be postponed until 30 June 2001.

5. The Joint Appeals Commission, which issued its report on 9 April 2001, allowed most of the complainant's pleas. It found that there was no valid reason for ending her appointment and that she had seemingly been given notice of termination during a period in which she was protected under Article 1060 of the Staff Regulations, by virtue of being on sick leave. It also found the termination abusive within the meaning of Article 1065.2 since it had been given during a period when "the employee [was] an elected employee representative in a company institution or in an enterprise affiliated thereto" and the employer could not prove that there was a "justified motive for the termination". The Commission further found that the abolition of her post could not be deemed a valid reason. The abolition of the post was immediately followed by the creation of a new post, of which the job description shows that it was almost identical to the one that had just been abolished except for the added requirement that the holder of the position should be able to lift 20 kilos or more. The Commission found it odd that such a requirement should be introduced, particularly because the complainant was suffering from back

problems and would not be able to comply with it. The Commission indicated on this point that "[t]ermination of a contract on a slight or questionable amendment of a job description may be perceived as unfair. There were no substantive changes in the new job description which would have made it necessary to terminate the contract and to announce the opening of a new position".

Although it rejected the complainant's claims with regard to the payment of her leave, the Commission unanimously recommended to the Secretary General that the case should be submitted for review by a legal expert to determine whether the Secretariat would be better advised to negotiate a settlement with the complainant or allow the matter to go to the Tribunal.

6. On 9 July 2001 the Federation offered the complainant an additional amount corresponding to two months salary in final settlement. However, by a letter of 12 July, the complainant refused this proposal. On 19 July 2001 the Secretary General withdrew the offer and dismissed the internal appeal. That is the impugned decision.

7. Pressing the pleas that she made in her internal appeal, the complainant seeks compensation equivalent to ten months salary, namely her salary for the month of June 2001, six months salary for abusive notice of termination and three months salary for moral damages, as well as compensation for the leave that she was not able to take.

8. It should be noted, with regard to the scope of the case at bar, that the complainant is not asking for her termination to be set aside, nor is she seeking reinstatement in the Federation. But the conditions under which her post was abolished must be reviewed, before addressing the issue of whether the Federation had a valid reason to derogate from the above provisions of the Staff Regulations.

In this respect, the Tribunal can only endorse the findings of the Joint Appeals Commission. Admittedly, precedent has it that international organisations can undertake restructuring where it is necessary to achieve greater effectiveness, or indeed to make savings, and can therefore regroup certain functions and make staff reductions. But any job abolitions arising out of such a policy must be justified by real needs, and not be immediately followed by the creation of equivalent posts. In the present case, the complainant held a post of technical assistant in the Information Systems Department, for which there was a detailed job description. The job title given on the new job description was still that of "technical assistant". The job description states that the post is also placed under the authority of the Director of the Information Systems Department; it enumerates duties that are slightly different but, on the whole, very comparable to those set out in the previous job description, and it sets out exactly the same requirements in terms of degrees, experience, skills and knowledge. The only significant difference, as noted by the Joint Appeals Commission, concerned the fact that some of the duties included lifting and carrying 20 kilos or more, which was bound to dissuade the complainant from applying or maintaining her application. The Federation admittedly denies any prejudice, and even states that the complainant withdrew her application when she stood a very good chance of being selected and that, far from challenging the abolition of her post, she carried out the transitional measures required and sought and found a new job.

But these considerations cannot in any way alter the reasons given for terminating the complainant's appointment. In view of the similarities between the job that was abolished and the post that was created, the Tribunal finds, as did the Joint Appeals Commission, that the reason given for terminating the complainant's employment was not valid.

9. The consequences of this finding on the complainant's entitlement to compensation may accordingly be examined.

10. First, the complainant recalls that she was notified of her termination on 21 November 2000. Referring to Article 1060.1(a) of the Staff Regulations, she contends that she should not have been given notice of termination before the expiry of the six-month protection period, that is not before 4 December 2000, as she had suffered total or partial incapacity for work since 5 June 2000. In evidence, she produces two medical certificates, one dated 10 July 2000 certifying her total incapacity for work from 5 June, and the other dated 22 November, certifying that her capacity for work had been 50 per cent since 4 September.

The Federation demurs. It argues that she was not suffering from incapacity for work on 21 November and that she had announced, on 20 November 2000, that she was returning to work full time, as recorded by the Human Resources Department. It also refers to several e-mails exchanged between the complainant and the head of her Department in which she made no mention of her incapacity for work.

However, in practice, these submissions show that she was far from working full time, and the administrative document produced by the Federation, which is neither signed nor dated, cannot prevail over a medical certificate specifically indicating that her capacity for work was diminished during the period under consideration. The complainant's appointment could only therefore be lawfully terminated during that period for "valid reasons", which was not the case. The complainant is right in saying that the starting point of her period of notice had to be 4 December 2000 - that is, upon the expiry of the six-month period which began on 5 June 2000. Moreover, as envisaged by the Head of the Human Resources Department in her letter of 21 December 2000, even though she continued to consider the notification of 21 November valid, it is indeed the letter of 21 December 2000 which sets off the complainant's period of notice, with the expiry date of the contract being 30 June 2001.

11. Secondly, the complainant submits that her termination must be deemed abusive as it was in breach of Article 1065.2(b) of the Staff Regulations.

The complainant was President of the Staff Association and, in that capacity, co-Chair of the Joint Staff and Management Commission when she was notified of her termination. Admittedly, the wording of the French version of Article 1065.2(b) is not clear and the English version, which is the authoritative text, is not clear either. Nevertheless, it only makes sense if it is construed as recognising that elected representatives of the staff enjoy specific rights and safeguards in accordance with the general principles which govern employment relationships in international organisations and which are also generally recognised in national labour legislation. The complainant does not allege that her employment was terminated because she was President of the Staff Association, in which case Article 1065.2(a) of the Staff Regulations would have been applicable. But the mere fact that she was a member of the Joint Staff and Management Commission, as a representative elected by her colleagues, means that she can claim this specific protection, which must be afforded by organisations to staff representatives.

12. To avoid the application of that Article, the Federation needed to prove that there was a "justified motive" for termination. But, as indicated above, it has not done so. The complainant is therefore right to seek compensation for abusive termination. Under the terms of Article 1065.3, this indemnity shall "not exceed the employee's wages for six months". In the circumstances, the Tribunal deems it equitable to grant the complainant an indemnity equivalent to three months salary.

13. Thirdly, the complainant presses her plea for the payment of a sum corresponding to the leave that she was not able to take. She is undoubtedly entitled to leave for her period of service with the Federation. In rebuttal, however, the Federation cites Article 835.4 of the Staff Regulations, which provides that staff members leaving the Federation "must use up their leave before the termination date". It adds that this last clause only provides for the payment of days of leave not taken in the case of "immediate" termination for valid reasons.

In the case at bar, termination of employment was not notified with immediate effect. The complainant had every opportunity to take her leave during her notice period, particularly since she did not have to report for work. In these circumstances, payment of leave for 2000 or for the period between 1 January and 30 June 2001, during which the complainant had moreover found a job, would not be justified.

14. Taking into account all the circumstances of the case, the Tribunal finds that the moral prejudice suffered by the complainant is adequately compensated by the present ruling and by the various indemnities she has already received.

15. Having succeeded, she is entitled to costs, which are set at 5,000 Swiss francs.

16. The Federation's claims for the granting of costs must therefore fail.

DECISION

For the above reasons,

1. The decision of the Secretary General of the Federation dated 19 July 2001 is set aside.

2. The Federation shall pay the complainant an indemnity equivalent to:

(a) the salary that she would have received for the month of June 2001; and

(b) three additional months salary.

3. It shall pay her 5,000 Swiss francs in costs.

4. The complainant's other claims are dismissed.

5. The Federation's counterclaim is dismissed.

In witness of this judgment, adopted on 15 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

(Signed)

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 22 July 2002.