

NINETY-FIFTH SESSION

Judgment No. 2245

The Administrative Tribunal,

Considering the complaint filed by Mr J. G. against the International Federation of Red Cross and Red Crescent Societies (hereinafter "the Federation") on 5 April 2002, the Federation's reply of 27 June, the complainant's rejoinder of 13 September and the Federation's surrejoinder of 18 October 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. The complainant, who was born in 1959 and has Irish nationality, joined the Federation in 1990. He was appointed Deputy Director of the Europe Department, in Geneva, with effect from 1 September 1994, then Head of Delegation in Viet Nam for a period of two years, from 1 July 1998 to 30 June 2000. This mission was extended until 30 June 2001.

On 9 October 2000, in the context of a restructuring operation at the Federation's Secretariat, the post of Deputy Director of the Europe Department was abolished. Between December 2000 and April 2001 the complainant applied for three posts in Geneva without success. In March and April 2001 he had several exchanges of correspondence, particularly with the Acting Director of the Human Resources Department. The complainant was concerned that there would be no post for him at the end of his mission in Viet Nam and, having a wife and three young children, he indicated that he was worried about the consequences of this uncertainty for his family. By a letter of 11 May 2001 the Director of Programme Coordination and the Director of the Division of Corporate Services - the former Acting Director of Human Resources - informed the complainant that there was no vacant post for him in Geneva. They cited part of Article 510 of the Staff Regulations, as follows:

"All staff members must be available throughout their term of employment to carry out missions in any of the (League's) delegations or to work in the Secretariat, as the Federation may need..."

They drew his attention to the posts of Head of Delegation in Belgrade, Moscow and Tanzania, respectively, adding the following statement:

"if by the end of your current assignment (30 June '01) you have not accepted one of the above posts, or other suitable vacancies in the field, we will assume that you are resigning."

The complainant replied on 20 May. He enquired whether this letter constituted notice of termination of his appointment, against which he would have to appeal. He indicated that he had no intention of resigning and reiterated his concerns about the security of his family. He pointed out that the post in Tanzania was no longer vacant but stated that he was willing to consider the Moscow post provided that his concerns were addressed. He noted that the remaining part of Article 510 of the Staff Regulations, which had not been cited, reads as follows:

"... When deciding what duties staff members are to perform they shall be consulted and consideration shall be given to their abilities and interests."

He considered that no such consultation had taken place and that the stated criteria had not been taken into account.

By a letter of 22 May the Director of the Division of Corporate Services informed the complainant that the letter of 11 May did not constitute notice of termination and provided the names of staff members who could inform him about Moscow and Belgrade. He added that he considered that the complainant had been consulted regularly since December 2000. The complainant replied on 23 May. He asked for the contact details of delegates in Moscow, since he had been unable to contact the staff members mentioned in the letter, and he asked whether the posts of Head of Delegation in Moscow or Belgrade were being offered to him, or whether he would be required to undergo a selection process. He also pointed out that the possibility of obtaining a post at the Secretariat in Geneva on completion of his mission to Viet Nam - which he had understood to be a "gentleman's agreement" between the Federation and himself - was in fact a guarantee under Article 940.1 of the Staff Regulations, which provides as follows:

"Long-term missions are defined as missions of 6 months or longer. [...] Upon completion of a long-term mission staff members are guaranteed a position at the Secretariat which is at least at the same level as the position they had before leaving on mission unless different dispositions were agreed in writing beforehand by both parties."

Ultimately, the complainant decided not to accept the post of Head of Delegation in Moscow for two main reasons: the financial situation of the Moscow delegation and his fears for the safety of his family in that duty station.

By a letter of 27 June 2001 the Director of the Division of Corporate Services informed the complainant that since he had accepted none of the vacant posts they had discussed, he considered that the complainant was resigning with effect from 30 June 2001. Nevertheless, he gave the complainant six months' notice during which he was not required to report for duty. The complainant filed an appeal with the Joint Appeals Commission on 28 June. On 19 July the Director of the Division of Corporate Services acknowledged that the complainant did not wish to resign. However, he informed the complainant that since his former post at the Secretariat no longer existed, and since he had not accepted the posts offered to him, the Federation had no option but to terminate his appointment with effect from 31 January 2002. The Director considered that the posts of Head of Delegation in Belgrade, Moscow and Tanzania, respectively, were reasonable offers and that, consequently, no indemnity for redundancy was due. In the light of that decision, the complainant added further submissions to his appeal on 6 August. By a letter of 16 August 2001 the Director of the Division of Corporate Services rejected the complainant's arguments, refused to pay him an indemnity and informed him of the formalities associated with his termination. The complainant was not required to work during the remaining period of notice.

In its report submitted to the Secretary General of the Federation on 28 November 2001, the Joint Appeals Commission, having noted that the complainant's post at the Secretariat had been made redundant, took the view that the offers of vacant posts in the field were not "reasonable offers" within the meaning of Article 1030.4 of the Staff Regulations⁽¹⁾ regardless of whether or not they had been made officially. Consequently, it recommended *inter alia* that an indemnity for redundancy be paid to the complainant in addition to the indemnity due in respect of his notice period, and that independent legal advice be sought in order to determine whether the termination of his appointment was abusive within the meaning of Article 1065 of the Staff Regulations.⁽²⁾ By a letter of 10 January 2002, which constitutes the impugned decision, the Secretary General of the Federation informed the complainant that he did not accept the recommendation concerning the payment of an indemnity and confirmed the decision of 16 August 2001.

B. Referring to Article 510 of the Staff Regulations and to Article 940.1, which stipulates that "[d]ue consideration will be given to the qualifications required for the mission, the family situation, age and health and other exceptional circumstances before [an] assignment [of 6 months or longer] is agreed", the complainant accuses the Federation of having failed to give serious consideration to his family concerns in the event of an assignment to Moscow. He also points out that by virtue of that same article, he was guaranteed a post at the Federation's Secretariat in Geneva on completion of his mission to Viet Nam.

He submits that no "reasonable offer of transfer" - which could only have been a post at the Secretariat - was made to him following the abolition of his post as Deputy Director of the Europe Department and that he was, therefore, entitled to an indemnity for redundancy under Article 1030.4. The Federation not only breached the provisions of the Staff Regulations but also disregarded the complainant's dignity in the manner in which it communicated with him.

Relying on the findings of the Joint Appeals Commission and on Article 1065 of the Staff Regulations, the complainant argues that his notice of termination was abusive because, by the defendant's own admission, the

decision to terminate his contract was the consequence of his refusal to accept the assignment in Moscow, despite the fact that he was entitled to a post in Geneva.

The complainant asks the Tribunal to set aside the impugned decision, to award him an indemnity for redundancy amounting to 12 months' salary, an indemnity for abusive termination amounting to six months' salary, moral damages in the amount of 10,000 Swiss francs and costs.

C. In its reply the Federation refers extensively to the Tribunal's case law. Regarding the indemnity for redundancy, it asserts that the staff responsible for personnel management tried to find a post for the complainant in Geneva. Indeed, the complainant participated in several competitions, but he could not be selected since he was not the best candidate. Under those circumstances, the offer of a transfer to the post of Head of Delegation in Moscow was a reasonable offer within the meaning of Article 1030.4 of the Staff Regulations, because it took into account his abilities and interests, and because the information about Moscow provided at his request "was reassuring on the whole". The Federation acknowledges the existence of a guarantee of returning to the Secretariat in Geneva after a long-term mission. However, it points out that in this case, and in the absence of a vacant post corresponding to the complainant's abilities and interests, it was impossible to honour that guarantee "for reasons beyond the power of the Secretary General". The latter had a duty, in the interests of both the Federation and the complainant, to seek to reassign him to the field. Since the complainant refused the reasonable offers made to him, he has forfeited his right to an indemnity for redundancy.

According to the defendant, the claims for an indemnity for abusive termination and for moral damages are unfounded. Firstly, they are linked to the principal claim for an indemnity for redundancy, which is itself unfounded. Secondly, the complainant's appointment was terminated, not because he was asserting his right to return to Geneva, but because his former post had been abolished. Lastly, the Federation "fails to see how a decision interpreting provisions of the Staff Regulations, albeit in a manner contrary to the opinion of the complainant and to that of the Joint Appeals Commission, which is a consultative body, could result in moral injury".

D. In his rejoinder the complainant discusses each of the judgments cited by the defendant in turn and argues that they are not relevant in this instance, because the circumstances of the case and the applicable provisions are different. He reiterates that no official offer was made to him in respect of the Moscow post, since the preliminary steps required for such an offer were not taken. Moreover, the information received concerning the Moscow delegation had not reassured him as to his family's safety or indeed the financial viability of that delegation. Lastly, the complainant accuses the Federation of not acting in good faith, by omitting to draw his attention to Article 940.1 of the Staff Regulations: in order to avoid honouring its statutory obligations, it led him to believe that he had to resign.

E. In its surrejoinder the Federation observes that, in his rejoinder, the complainant "seeks neither the annulment of his termination, nor reinstatement", and that the impugned decision is challenged only insofar as it denied him an indemnity for redundancy. According to the defendant, this implies that his claim for an indemnity for abusive termination is irreceivable, being unconnected with the payment of an indemnity for redundancy.

It reiterates that the offer of a transfer to Moscow was in fact made and that there had been no point in accomplishing any internal formalities until the complainant had indicated that he agreed to it in principle. The Federation points out that although the possibility of resignation had initially been mentioned, the final decision of 10 January 2002, and likewise the letters of 19 July and 16 August 2001, referred to termination of his contract for redundancy. The defendant submits that the central issue is that of what to do in the event that, on completion of a long-term mission, a staff member cannot be assigned to a post in Geneva as guaranteed by Article 940.1. Should it systematically terminate the staff member's appointment for redundancy and pay the corresponding indemnity, or should it endeavour to find the staff member an assignment in the field reflecting his or her interests and abilities, bearing in mind that if the staff member refuses a "reasonable offer of transfer", he or she forfeits the right to the indemnity in question? The Federation considers that the complainant's interpretation of the relevant provisions favours the former approach, whereas it takes the view that the second approach alone is consistent with the interests of both the Federation and its staff.

CONSIDERATIONS

1. The complainant asks the Tribunal to set aside the decision of 10 January 2002 by which the Secretary General of the Federation rejected the Joint Appeals Commission's recommendation that an indemnity for redundancy be paid to the complainant and thereby confirmed an earlier decision to terminate his appointment. He also asks the Tribunal to order the Federation to pay him an indemnity for redundancy equal to 12 months' salary, an indemnity for abusive termination of his contract amounting to six months' salary, moral damages in the amount of 10,000 Swiss francs and costs.

In his rejoinder the complainant points out that he is not seeking the annulment of the termination of his contract, nor reinstatement, but the application of the provisions governing redundancy, since the Federation has acknowledged that the decision of 19 July 2001 terminating his appointment was based on Article 1030 of the Staff Regulations. Nevertheless, he states that he "maintains all the claims" put forward in his complaint.

The first issue to be resolved is that of whether the complainant satisfied the conditions for entitlement to an indemnity for redundancy.

2. The complainant does not dispute the Federation's right to terminate his appointment for redundancy under Article 1030.1 of the Staff Regulations, but he considers that he is entitled to the indemnity provided for in Article 1030.4. In his view, since the defendant was unable to offer him another post at the Secretariat in Geneva on completion of his long-term mission to Viet Nam, which it was required to do under Articles 1030.1 and 940.1 of the Staff Regulations, it had to pay him the indemnity for redundancy provided for in Article 1030.4. He considers that the post of Head of Delegation in Moscow was not a "reasonable offer of transfer" and that in any case no official offer concerning that post had been made to him.

3. The defendant retorts that the complainant was not entitled to the said indemnity because, after his post had become redundant, he did not accept the reasonable offer made to him, and there was no vacant post in Geneva to offer him.

It adds that the complainant's assertions are based on an erroneous interpretation of the applicable texts.

According to the defendant, by refusing a reasonable offer, for reasons of his own, in order to rely on a guarantee which, as he knew and acknowledged, could not be honoured, the complainant forfeited his right to the indemnity provided for in Article 1030.4 of the Staff Regulations. Indeed, the Federation takes the view that although the guarantee of returning to the Secretariat in Geneva exists, a question arises as to its scope in the event that there is no vacant post in Geneva corresponding to the qualifications and interests of the person concerned, which, together with the obligation to select the most qualified person for any vacant post where several candidates apply, constitute the only criteria for appointing staff members of the Federation. In such a case, the defendant considers that it is impossible to honour the guarantee stipulated in Article 940.1 of the Staff Regulations, "for reasons beyond the power of the Secretary General". The logical approach, it argues, is to terminate the appointment of the person concerned for redundancy if there is no available post in Geneva nor any likelihood of one becoming available in the near future. However, the defendant points out that under Article 1030.1 of the Staff Regulations the Secretary General has a general duty not to resort to termination for redundancy until he has exhausted all possibilities for assigning the person concerned to a suitable vacant post, "in consultation with him and taking into account his interests and abilities".

The Federation observes that it was in fact in its own interest, as well as the complainant's, to make every effort to preserve an employment relationship which had been satisfactory until then, and that it did so, in accordance with its constant practice and even though it has few posts at the complainant's level, by offering him several posts for which he had the required qualifications and skills, and which involved no particular difficulty within the meaning of Article 940.1 of the Staff Regulations. The defendant adds that whilst Article 1030.1 of the Staff Regulations is applicable, so too is Article 1030.4. Consequently, it argues that it was because he refused a reasonable offer of transfer, such as that of Head of Delegation in Moscow, that the complainant forfeited his right to an indemnity for redundancy.

4. The relevant provisions of the Staff Regulations read as follows:

"020 Definition

020.1 In these Staff Regulations the term 'Secretariat' will be used to describe the Secretariat of the International

Federation of Red Cross and Red Crescent Societies (the Federation), located in Geneva."

"510 Assignment to Duty

All staff members must be available throughout their term of employment to carry out missions in any of the League's delegations or to work in the Secretariat, as the Federation may need, and to act as Duty Officer on call. Initial recruitment in a particular capacity shall not be a bar to a staff member's performing any other duties to which he/she may be assigned. When deciding what duties staff members are to perform they shall be consulted and consideration shall be given to their abilities and interests."

"940 Special provisions for long-term missions carried out by the Staff of the Secretariat of the Federation

940.1 Long-term missions are defined as missions of 6 months or longer. These missions are considered as temporary assignments during which the basic contract with the Secretariat of the Federation is maintained. All staff members of the Secretariat can apply for such missions or can be asked to carry out such missions. Due consideration will be given to the qualifications required for the mission, the family situation, age and health and other exceptional circumstances before such assignment is agreed. Upon completion of a long-term mission staff members are guaranteed a position at the Secretariat which is at least at the same level as the position they had before leaving on mission unless different dispositions were agreed in writing beforehand by both parties."

"1030 Redundancy

1030.1 A staff member whose position has become redundant shall be offered transfer to another post in the Secretariat if a suitable opening is available. A redundancy can occur due to reduced activities as well as for cases when qualifications to handle the job have changed and a staff member with a different background is required.

1030.2 The Secretariat shall try to assist the staff member to find a position outside the Secretariat.

1030.3 Termination under this Article 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.

1030.4 A staff member whose appointment is terminated under this Article and to whom no reasonable offer of transfer has been made shall be paid an indemnity of 1 month's salary for each year of service (maximum 12 months' salary)."

"1065 Abusive Termination

1065.1 The notice of termination of an employment relationship is abusive if a party gives it:

- a) because of a quality inherent in the personality of the other party, unless such quality relates to the employment relationship or significantly impairs cooperation within the enterprise;
- b) because the other party exercises a constitutional right, unless the exercise of such right violates a duty of the employment relationship or significantly impairs cooperation within the enterprise;
- c) to solely frustrate the formation of claims of the other party arising out of the employment relationship;
- d) because the other party asserts in good faith claims arising out of the employment relationship;

[...]

1065.3 The party which abusively gives notice of termination of the employment relationship shall pay an indemnity to the other party. The indemnity shall be determined considering all circumstances. It shall, however, not exceed the employee's wages for six months. Claims for damages based on other legal grounds are unaffected."

5. The Tribunal considers that the Joint Appeals Commission, applying the foregoing provisions to the facts of this case, rightly recommended to the Secretary General that an indemnity for redundancy should be paid to the complainant. At the end of the long-term mission to Viet Nam, a position at the Secretariat at least at the same level as the position he held prior to his departure had to be offered to the complainant, since no other

arrangements had been agreed by the parties beforehand in writing, in accordance with Article 940.1 of the Staff Regulations.

Under Article 1030.1, since the post of Deputy Director of the Europe Department had been abolished in the context of a reorganisation of the Secretariat, the complainant had to be offered a transfer to another post within the Secretariat, if a suitable vacancy existed.

It appears that there was no vacancy at the Secretariat and that, having regard to the definition of the Secretariat provided in Article 020.1 of the Staff Regulations and to the nature of the long-term mission, the offers of employment in the field could not constitute reasonable offers for the complainant. He was therefore entitled to claim an indemnity for redundancy in addition to his period of notice.

On this issue, the defendant's interpretation of the applicable provisions cannot be accepted. Indeed, its interpretation would deprive the said provisions of their meaning. Consequently, the impugned decision must be set aside insofar as it denied the complainant an indemnity for redundancy.

6. Since the indemnity provided for under Article 1030.4 is equal to one month's salary per year of service, the complainant, whose appointment began on 1 September 1990 and who was therefore in his twelfth year of service by 31 January 2002, is entitled to an indemnity equal to 12 months' salary.

7. His claim concerning the payment of an indemnity for abusive termination cannot be allowed. Indeed, having acknowledged that his appointment was terminated for redundancy and having claimed the indemnity stipulated for such cases, the complainant cannot combine that indemnity with an indemnity for abusive termination.

8. However, the Tribunal considers that the attitude displayed by the defendant, by persistently attempting to treat the complainant in a manner contrary to the provisions of the Staff Regulations in circumstances such that he lost all legitimate hope of finding another post at the Secretariat in Geneva, caused him a moral injury which shall be remedied by an award of 5,000 Swiss francs.

9. The complainant is entitled to 5,000 francs in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside insofar as it denied the complainant an indemnity for redundancy.
2. The Federation shall pay the complainant an indemnity equal to 12 months' salary.
3. It shall also pay him 5,000 Swiss francs in moral damages.
4. It shall pay him 5,000 francs in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 21 May 2003, 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 16 July 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

1. Article 1030.4 provides as follows: "A staff member whose appointment is terminated under this Article [concerning redundancy] and to whom no reasonable offer of transfer has been made shall be paid an indemnity of 1 month's salary for each year of service (maximum 12 months' salary)."

2. Article 1065 provides, in pertinent part, that: "The notice of termination of an employment relationship is abusive if a party gives it [...] because the other party asserts in good faith claims arising out of the employment relationship [...]".

Updated by PFR. Approved by CC. Last update: 23 July 2003.