115th Session **Judgment No. 3208**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr P. R.-G. against the International Federation of Red Cross and Red Crescent Societies (hereinafter "the Federation") on 9 February 2011 and corrected on 11 March, the Federation's reply of 20 June, the complainant's rejoinder of 27 July and the Federation's surrejoinder of 27 October 2011;

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 British national born in 1955, joined the Federation in 1993. His fixed-term contract was converted into an open-ended contract in May 1997. In January 2004, after holding various positions in the Federation, he was appointed as Head of the Operations Support Department (OSD) in the Disaster Response and Early Recovery Division (DRER).

In 2009, in the context of a restructuring exercise known as the "Moving Forward Together" process (MFT), it was announced that

OSD would be merged with the Operations Coordination Team (OCT) and the Technical Advisory Team (TAT) to form a Disaster Services Department (DSD). As a consequence of the merger, the positions of Head of OSD, Head of OCT and Head of TAT were to be replaced with a new position of Head of DSD.

On 23 July 2009 the complainant met with his line manager and the Director of the Human Resources Department to discuss the job description for the new post. In accordance with the "Human Resource Principles and Policies" for the MFT process, dated 1 July 2009, it was necessary to determine whether the position of Head of OSD had "changed" in relation to the new post of Head of DSD, in which case a redundancy process would ensue, or whether it had merely "evolved", in which case the complainant would remain in his post with a new title and a new job description. During this meeting he was informed that, according to Management, his post had "substantially changed" in relation to the new post and that, according to the MFT principles, it had therefore been "cut". Consequently, his contract would be terminated if he did not find another post in the Secretariat before the end of his notice period. The substantial changes identified by Management were the introduction of two new areas of work, namely Recovery and Livelihoods/Food Security, and a greater focus on policy. At the end of the meeting the complainant was handed a letter dated 23 July 2009, in which he was given six months' notice and was invited to apply for any suitable vacancies, including the new post of Head of DSD.

On 27 July the vacancy announcement for that post was published. The complainant applied for it and was interviewed, but the candidate ultimately selected was one of the other department heads affected by the merger. The complainant's position was officially abolished on 1 October 2009, when the Head of DSD took up his functions.

On 5 November 2009 the post of Senior Officer, Livelihoods and Nutrition was advertised. On 11 November the complainant submitted a grievance to the Director of Human Resources, alleging that the job description for this post clearly duplicated some of the responsibilities

of the Head of DSD. He therefore questioned whether the decision that his previous post had "changed" rather than "evolved", according to MFT definitions, was still valid, as some of the key new functions on which it was based appeared to have been assigned to another department. Pending clarification of this matter he "withdrew" his signature from the redundancy notice and reserved the right to challenge the decision to treat his post as having "substantially changed".

On 2 December 2009 the complainant notified the Director of Human Resources by e-mail that he might be willing to accept a post in Geneva at a lower level than that of Head of Department. He also expressed an interest in two unit head posts and enquired as to when they would be advertised. During the period November 2009 to January 2010 the complainant also met with representatives of the Legal and Human Resources Departments and informed them of his willingness to assume an acting position during his notice period and beyond. The position of Acting Head, Humanitarian Affairs and Partnerships Department was announced in November 2009 but was filled by a Senior Officer in December 2009.

In an e-mail of 30 January 2010 to the Director of Human Resources, the complainant stated that he had discovered that the Human Resources Department had not presented his idea of assuming an acting position to the relevant departments. He asserted that several department heads had expressed their support for it, and he asked her to pursue this idea with the relevant persons and to freeze his redundancy payment pending a decision by the Secretary General.

On 31 January 2010 the complainant's contract was terminated. He received a redundancy payment equivalent to 12 months' salary. On 4 February he filed a grievance with the Joint Appeals Commission for unfair dismissal. On 31 July 2010 the Panel established by the Commission sent its report to the Secretary General who, on 18 August 2010, referred the report back to the Panel for further clarification. The Panel submitted its reply on 30 September 2010. It confirmed its main finding that the complainant's post should not have been made redundant and that it should have been treated as a "post evolved",

because no substantial changes in the functions of the Head of DSD could be found to justify the "post is cut" process. It also found that the Human Resources Department had failed in its obligation to offer him a reasonable transfer to another post and that the way in which his redundancy had been handled showed a breach of the Federation's duty of care. The Panel recommended that the complainant be reinstated in a position of similar grade and that he be given access to the internal job website and considered as an internal candidate for the following 12 months.

By a letter dated 25 November 2010 the Secretary General informed the complainant of his decision to reject the Panel's findings, explaining that his former position had been cut and that, as he had not been selected for the new position and had not applied for any other posts, the Federation could not offer him another position. The Secretary General nevertheless accepted the Panel's recommendation to give the complainant access to the internal job website and consider him as an internal candidate for the following 12 months. That is the impugned decision.

B. The complainant contends that the Federation's decision that the post of Head of OSD had changed and not evolved in relation to the post of Head of DSD was based on reasons which were not truthful. He points out that the job description for the post of Head of DSD contained no reference to policy, which was one of the main reasons advanced for the post having "substantially changed". Further, the areas of Livelihood and Nutrition, which constituted the other main changes to his previous post, were later placed under another department. Therefore, in his view, the impugned decision was taken in breach of the Federation's applicable rules, it overlooks essential facts and it constitutes an abuse of authority. He also submits that the Secretary General did not substantiate or sufficiently justify his decision to reject the recommendations of the Joint Appeals Commission.

The complainant alleges that the Federation breached the Staff Regulations and the Tribunal's case law by failing to offer a long-serving

staff member holding an indeterminate contract a transfer to another post in the Secretariat when his post became redundant. He submits that there was no effort on the part of the Human Resources Department to find a suitable position for him within the Secretariat. Moreover, the Federation breached its duty of care and its duty to treat him fairly and with respect for his dignity during the redundancy process. Indeed, he was assigned only one task during his notice period, he was excluded from meetings with external partners and his personal circumstances were not taken into account.

The complainant requests an oral hearing. He asks the Tribunal to order the Federation to produce correspondence and any other documents relevant to the termination of his contract for redundancy, to the appointment of a Senior Officer to the post of Acting Head, Humanitarian Affairs and Partnership Department in or around November 2009, to the recruitment process for the position of Head of DSD and to the efforts undertaken by the Federation to offer him a transfer to a suitable post. He seeks the quashing of the impugned decision and reinstatement in his previous post or a "reasonable equivalent" with retroactive effect. Alternatively, he asks the Tribunal to order the payment of all salary, benefits, entitlements and other emoluments he would have been entitled to had his employment not been terminated, from 1 February 2010 to his statutory date of retirement or to 31 December 2012, whichever is later. He claims 250,000 United States dollars in damages for injury to his physical and mental health, 500,000 dollars in moral and exemplary damages, with interest, and costs.

C. In its reply the Federation asserts that there are significant differences between the post of Head of DSD and the complainant's former post of Head of OSD. It submits that the advertisement for the post of Senior Officer, Livelihoods and Nutrition in another department is irrelevant, as one of the main reasons for the restructuring and the new strategy in the DRER Division was the cross-cutting nature of certain key portfolios, including livelihoods and food security. Therefore, it was always envisaged that both departments would handle aspects of these portfolios.

Regarding the allegation that it failed to offer the complainant an alternative position, the Federation states that the Human Resources Department was always available to meet with him and provide advice on alternative positions, but there were no suitable available positions which he could fill at Headquarters, and he did not manifest an interest in positions which were available in the field. Given his refusal to consider positions in the field and the limited possibilities available in Geneva at the time, there was no clear alternative position available in the short term which the complainant could have eventually filled. Moreover, the Federation denies that the complainant's dignity was not respected. It asserts that he was duly consulted about the restructuring and that his work assignments during his notice period took into account the need for him to have time to find another job.

Lastly, the defendant contends that the Secretary General's decision was justified, as a number of elements in the Joint Appeals Commission's report were unclear or untreated, key witnesses were not interviewed and its findings were tainted with errors of fact and law.

D. In his rejoinder the complainant presses his pleas. He submits that the Federation has produced no evidence to support its assertion that the post of Head of DSD had significantly changed in relation to the post of Head of OSD.

Regarding the defendant's statement that he did not apply for any position other than that of Head of DSD, he observes that none of the positions for which he could have applied was opened during his notice period. For instance, the position of Acting Head, Humanitarian Affairs and Partnership Department was never advertised, in violation of the Staff Regulations; the Senior Officer was simply appointed to it, despite his repeated expression of interest for posts in that department. Similarly, the position of Unit Manager, Donor Relations and Fundraising was not announced until shortly after his last day of employment and two days after his access to the internal website had stopped. Lastly, the complainant asserts that, according to the Tribunal's case law, it is not up to him to prove that he was able to remain in the Federation's

service in some capacity; it is up to the Federation to prove the contrary, which it has clearly failed to do in this case.

E. In its surrejoinder the defendant maintains its position in full. It denies that no efforts were made to find the complainant another suitable position and notes that the complainant himself acknowledges that there were no posts available in Geneva at his level. As regards the post of Acting Head, Humanitarian Affairs and Partnership Department, the Federation emphasises that it was filled without competition, as is always the case for posts filled on an Acting basis. Lastly, it points out that the Staff Regulations do not afford staff members whose posts have been abolished preference over other staff in a competition process.

CONSIDERATIONS

1. The complainant commenced employment with the Federation in 1993. In due course his fixed-term contract was converted into an open-ended contract effective 17 May 1997. By letter dated 23 July 2009 the complainant was advised that it had been decided to terminate his employment for redundancy. The letter gave him six months' notice. At this time the complainant was Head of the Operations Support Department. It was not in issue that organisational changes were then being made that impacted on the complainant's role within the Federation. One important point that was in issue, was the nature and extent of the impact.

2. The complainant challenged the termination of his contract in an internal appeal. The Joint Appeals Commission set out its conclusions and recommendations in a report dated 31 July 2010. The Commission reached four key conclusions and made two key recommendations. First, it concluded that the complainant's post should have been treated as "post evolved" and that the complainant had wrongly been the subject of a "post is cut" procedure. Second, it concluded that the Human Resources Department had failed to offer

the complainant a reasonable transfer to another post within the Secretariat. Third, it concluded that the complainant had not been dealt with in a sensitive and fair way and his dedication to the organisation over a lengthy period of time had not been taken into account. Fourth, it found that the way his redundancy was handled reflected a lack of care, communication, respect and support to someone of his position with many years of experience and loyal service. It also found that the Federation did not ensure continuity within the Department or with external partners via any handover plan, communications or discussions with the complainant before he left.

3. The Commission's first recommendation was that, in line with the Governing Board's decision that continuity was to be maintained, the complainant be reinstated to a position of a similar grade which matched and utilised his many competencies and skills. The second recommendation was that in order for the complainant to be able to apply for future posts within the Federation, he should be given access to the internal job website and considered as an internal candidate for the following 12 months.

4. The Secretary General did not accept the Commission's conclusions and rejected the first recommendation though he accepted the second. This was communicated to the complainant in a letter dated 25 November 2010, which is the impugned decision. In that letter the Secretary General pointed out that he had requested further clarification from the Commission about its report by an e-mail of 18 August 2010. Appended to the letter was the Commission's report, his e-mail of 18 August and the Commission's response of 30 September 2010.

5. In his decision the Secretary General expressed the conclusion that he "[did] not accept the findings, interpretations, and conclusions of the Panel in regards to [the complainant's] claims of the post not being effectively cut; the organization's failure to offer [him] another post; and the alleged moral prejudice and lack of care

from the Federation". The Secretary General went on to assert as follows: "Your former position of Head, Operations Support Department was cut due to a reduced head-count and resultant re-structuring of the Disaster Response and Early Recovery Division which effectively merged three positions into one. A recruitment was held. You applied and were not deemed by the panel as the best candidate. As you only applied for this one post we could not offer you any other position in the Federation. Your contract was terminated for redundancy granting you the appropriate notice and termination benefits due as per the Staff Regulations." The Secretary General then said the following: "For these reasons we can not accept the recommendation of the Panel to reinstate you in a post at a similar grade." The Secretary General indicated his agreement with the Joint Appeals Commission's recommendation about giving the complainant access to the internal job website and consider him as an internal candidate for 12 months. He concluded with the observation that he remained confident that the complainant's considerable skills and experience rendered him particularly well placed to be selected for future posts in the Federation and noted that the consultancy contract and interview the complainant had had in the last months demonstrated this.

6. In his brief the complainant advances four principal arguments. Firstly, the Secretary General did not substantiate or sufficiently justify his decision to reject the recommendations of the Joint Appeals Commission and the impugned decision is therefore invalid. Secondly, the decision abolishing the complainant's post and terminating his employment contract for redundancy was taken in breach of the Federation's procedural rules, overlooked central facts and constituted abuse of authority. Thirdly, the Federation failed to offer the complainant, a long-serving staff member with an indeterminate contract, a transfer to another post in the Secretariat once his post became redundant, before making the decision to terminate his employment contract. Fourthly, the Federation failed to fulfil its duty of care, and its duty to treat the complainant fairly and with respect for his dignity during the redundancy process.

7. The complainant has applied for oral hearings. The Tribunal, having examined the written submissions and their annexes and having found them sufficient, disallows the application.

8. In relation to the adequacy of the Secretary General's reasons for rejecting the Joint Appeals Commission's conclusions and its recommendation that the complainant be reinstated, the Federation, in its reply, notes that the Secretary General wrote to the Commission on 18 August 2010 because there were "a number of elements in the Panel's report which were unclear or untreated" and certain witnesses had not been called. The Federation goes on to argue, in effect, the case for rejecting the Commission's conclusions and recommendation. In his rejoinder the complainant contends that the Federation did not really address the issue that the Secretary General's final decision did not provide reasons for rejecting the Commission's conclusions and recommendation. In its surrejoinder the Federation acknowledges that the Secretary General was obliged to explain in adequate detail why he did not accept the Commission's conclusions and recommendation but then points to the Secretary General's e-mail of 18 August 2010 in which he either expressly or impliedly criticised aspects of the report, or the process leading to it, and in which he sought a response from the Commission. The Federation submits that the Commission did not modify a single sentence of its report and that it refused to consider the important factual and methodological issues raised in the Secretary General's e-mail. It states that it was unnecessary for the Secretary General to repeat these "flaws in detail" in his letter of 25 November given that the complainant had been provided with the initial report, the e-mail of 18 August 2010 and the Commission's response thereon.

9. However, this argument of the Federation might be sustainable if the Commission had not responded to the e-mail of 18 August 2010 or if its response was demonstrably inadequate, either because it did not engage with the issues raised in the e-mail at all or because, on their face, the answers to the express or implied criticisms were untenable. However, the Commission's response was not demonstrably inadequate. Indeed it took the form of extracting

from the e-mail of 18 August 2010 nine questions. This approach was entirely reasonable and captured the gist of the issues being raised by the Secretary General. In relation to each of the questions the Commission provided an answer or response mostly varying in length between several paragraphs to almost a page. Each of the responses was a cogent explanation of the course the Commission had taken or its reasoning process.

10. It is not possible to ascertain from the Secretary General's letter of 25 November 2010 the basis upon which he took the position that he "[did] not accept the findings, interpretations, and conclusions" of the Commission. It is of course conceivable that the Secretary General rejected entirely and without qualification each of the responses or answers provided by the Commission to the nine questions it had formulated. It is also conceivable that the Secretary General accepted some or all of the responses or answers in part or in whole. But whatever may have been his ultimate position, he was obliged to explain why he adopted the approach he did.

11. As the Tribunal has noted, the right to an internal appeal is a safeguard enjoyed by international civil servants (see Judgment 2781). If the ultimate decision-maker rejects the conclusions and recommendations of the internal appeal body, the decision-maker is obliged to provide adequate reasons (see Judgments 2278, 2355, 2699, 2807 and 3042). The value of the safeguard is significantly eroded if the ultimate decision-making authority can reject conclusions and recommendations of the internal appeal body without explaining why. If adequate reasons are not required, then room emerges for arbitrary, unprincipled or even irrational decision-making. In the present case, the Secretary General has not provided adequate reasons for rejecting the conclusions and the first recommendation of the Joint Appeals Commission.

12. The decision to terminate the complainant's employment will be set aside. Whether the Secretary General can terminate the complainant's employment and, in so doing, provide adequate reasons

for rejecting the conclusions and recommendation of the Joint Appeals Commission, will emerge in due course, if that proves to be the path the Secretary General follows. The complainant will therefore be awarded moral damages in the amount of 8,000 United States dollars. He is also entitled to costs in the amount of 4,000 dollars.

DECISION

For the above reasons,

1. The decision of the Secretary General of 25 November 2010 rejecting the recommendation of the Joint Appeals Commission to reinstate the complainant is set aside.
2. The matter is remitted to the Federation for the Secretary General to make a new decision having regard to the Tribunal's findings.
3. The Federation shall pay the complainant 8,000 United States dollars in moral damages.
4. It shall also pay him costs in the amount of 4,000 dollars.

In witness of this judgment, adopted on 3 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Michael F. Moore
Hugh A. Rawlins
Catherine Comtet