

109th Session

Judgment No. 2918

THE ADMINISTRATIVE TRIBUNAL,

Considering the first complaint filed by Ms A. M. against the International Federation of Red Cross and Red Crescent Societies (hereinafter “the Federation”) on 25 September 2008 and corrected on 13 November 2008, the Federation’s reply of 19 February 2009, the complainant’s rejoinder of 24 April and the Federation’s surrejoinder of 6 July 2009;

Considering the second complaint filed by the complainant against the Federation on 13 October 2008 and corrected on 18 December 2008, the Federation’s reply of 8 April 2009, the complainant’s rejoinder of 20 July and the Federation’s surrejoinder of 22 September 2009;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, a German national born in 1961, joined the Federation on secondment from the German Red Cross (“staff-on-

loan”) on 19 May 2003. She worked as a Senior Officer for the Public Health in Emergencies Unit (PHE) of the Health and Care Department under a fixed-term contract which was extended several times.

In 2006 the Federation began a restructuring process (the “Consolidation Project”), whereby roles and responsibilities formerly concentrated at Headquarters were decentralised to field offices. On 13 August 2007 the Head of the Health and Care Department met with the complainant to inform her that, due to “changes required by the consolidation process”, her staff-on-loan assignment would not be extended beyond its contractual end date of 31 October 2007. On 20 August 2007 the complainant sent him an e-mail objecting to the reduction of the PHE role and to the termination of her assignment. The following day she lodged a grievance with the Head of the Human Resources Department (HRD) concerning the termination of her assignment and the way in which she had been treated during the meeting of 13 August. The Head of HRD replied on 17 September that the decision not to extend her assignment had been properly taken and in accordance with the standard practice of the Federation.

By an e-mail of 31 October 2007 the complainant supplemented her grievance with allegations of harassment, misuse of power and defamation by her supervisor. On 12 December 2007 the Head of HRD informed her that, given the seriousness of these allegations, she would recommend to the Secretary General that a disciplinary process be opened. She added that it could take at least six months for such a process to be completed.

In January 2008 the complainant told the Head of HRD that she considered that she had exhausted the informal dispute resolution procedure and that she intended to lodge an appeal with the Joint Appeals Commission (JAC). Meanwhile, the Federation commissioned an independent investigator to examine her allegations. On 28 February 2008, while the investigation was still under way, she filed an internal appeal with the JAC, but the JAC decided to stay its proceedings pending the outcome of the investigation. By a letter dated 21 April 2008 from the Head of HRD the complainant was notified that the disciplinary process had been concluded and there had been no

finding of misconduct on the part of her supervisor that might have called into question the decision not to extend her staff-on-loan assignment. The JAC issued its report on 26 June 2008 in which it unanimously concluded that the case was not receivable, on the basis of a strict interpretation of the Federation's Staff Regulations related to appeals for staff-on-loan positions. It noted that "the various organigrammes accurately show[ed] that the [complainant]'s position no longer existed, and [that it was] the Federation's institutional prerogative to modify its structure to deliver and work effectively". It nevertheless expressed serious concern that the human resources process had been handled in an inappropriate and unprofessional manner and encouraged the Secretary General to take a more rigorous approach to ensure that attempts were made to resolve these types of situation at an earlier stage. The JAC considered that the case fell "outside its scope and role and advise[d] that it [concerned] a relationship issue to be taken up at an appropriate level between the Secretary General and the German Red Cross".

By a letter dated 27 June 2008 the Secretary General informed the complainant that he accepted the JAC's conclusion regarding the receivability of her case. That is the decision impugned in the first complaint.

Meanwhile, the complainant had submitted an application for the position of Head of the Health and Care Department. On 27 February 2008 she wrote to HRD to enquire as to whether she had been shortlisted for this position. On 14 April 2008 she was informed that the selection process had been finalised and that the name of the new Head of the Health and Care Department would be announced shortly. On 15 April the complainant asked the Head of HRD for a detailed reply giving the reasons for not considering her application. Following an exchange of e-mails, the complainant informed HRD on 17 April that she was appealing against the decision not to shortlist or select her for the position.

On 24 April 2008 she received an e-mail from the Head of HRD indicating that a candidate who best fulfilled the Federation's needs for the said position had been found and that there had been no need to

continue with the search. The complainant wrote back that same day expressing the view that her candidacy had been “irreparably injured” by the prejudice and mobbing to which her previous supervisor had subjected her, which had led to her illegal separation.

On 1 July 2008 the complainant lodged a grievance against the decision not to shortlist her for the position of Head of the Health and Care Department on the grounds that the selection process was tainted with bias. On 18 July 2008 she was notified by the Head of HRD that, as an external applicant for Federation posts, she had no right to raise grievances or to file an appeal under the Staff Regulations. That is the decision impugned in the second complaint.

B. In her first complaint the complainant contends that the decision to abolish her post was a mere pretext to get rid of her and that the notice of termination was therefore invalid. She argues that there is no evidence that the Federation had to abolish her post or that it performed a restructuring of the Health and Care Department. According to her, the termination of her contract was contrary to the Federation’s interests and not based on objective grounds, given that the workload in the PHE Unit increased substantially. Moreover, it was tainted by malice, prejudice, bias and ill will on the part of her supervisor who sought to undermine her position by systematically excluding her from important meetings and communications regarding the PHE. This, she argues, was humiliating and detrimental to her. In her opinion the abolition of her post was designed to cause her personal and professional injury.

The complainant considers that the manner in which the decision not to extend her contract was communicated to her was an affront to her dignity, and that her supervisor injured her good name and reputation by failing to keep that decision confidential.

She argues that she was harassed by her supervisor and by the transition manager i.e. the person engaged to guide the decentralisation process during a transitional period. This caused her serious injury and warrants the setting aside of the decision to abolish her post. Citing the case law, she contends that discretionary decisions

must be taken objectively and without prejudice, which did not occur in her case.

Lastly, the complainant asserts that the Federation committed a procedural irregularity by terminating her secondment and her contract without consulting her and the German Red Cross. Moreover, the decision to abolish her post was based on a “*détournement de procédure*”.

In this first complaint she asks the Tribunal to set aside the impugned decision and to order her immediate reinstatement in her former post with retroactive effect from 1 November 2007 or her appointment to a regular post commensurate with her skills, grade, training and experience. She seeks the payment of all salary, benefits and other emoluments “erroneously withheld from her” upon separation, if any, or, alternatively, payment of the difference between the salary and benefits she earned after her separation and those she would have received had she not been separated until the date of the present judgment or that of her reinstatement, whichever is the later. In addition, she claims 500,000 Swiss francs for actual and moral damages, an award of exemplary damages, costs, and interest on all these amounts. She also asks for a written apology from the Secretary General of the Federation, a work certificate, and removal from her personnel file of all documents regarding her separation and the harassment she was subjected to. She requests that the Federation be ordered to disclose various documents including those related to the investigation conducted and to restore her access to her Federation e-mail account. She also requests an oral hearing.

In her second complaint the complainant submits that she met all the requirements of the vacancy notice for the position of Head of the Health and Care Department, and that the arbitrary exclusion of her candidature was due to malice and bias on the part of her supervisor. She asserts that the successful candidate did not meet the minimum requirements of the vacancy notice. In her view, the decision not to shortlist her for a position for which she was clearly qualified was based on an incomplete consideration of facts and was therefore null and void. She also alleges that there was a conflict of interest for one

of the officials involved in the selection process, given the role he had played in the decision to terminate her assignment.

In this second complaint she asks the Tribunal to quash the impugned decision, to order her immediate appointment to the post of Head of the Health and Care Department with retroactive effect from 1 July 2008 or, alternatively, her retroactive appointment to a post with commensurate skills, grade, training and experience, including payment of all salary, benefits and other emoluments. She claims 500,000 francs for actual and moral damages, costs, and interest on all amounts awarded. She also requests the production of several documents and the holding of an oral hearing.

C. In its replies the Federation contests the receivability of the two complaints on the grounds that they do not fall within the jurisdiction of the Tribunal. It asserts that the complainant had no employment relationship with the Federation, given that “staff-on-loan” are defined in Article 2.1(t) of the Staff Regulations as “staff employed by National Societies or other independent institutions who are on loan to the Federation, but have not concluded an employment contract with the Federation”. Moreover, the terms of her employment were regulated by the agreement between the Federation and the German Red Cross, and at all times during her service the complainant remained employed by the latter.

The Federation further asserts that the declaration recognising the Tribunal’s jurisdiction which the Federation addressed to the Director-General of the International Labour Office stipulated that “the acceptance of [the Tribunal’s] jurisdiction by the International Federation [...] will apply to all staff members holding a contract of employment with the International Federation. [...] As a consequence, the International Federation’s acceptance of the Tribunal’s competence does not extend to other categories of persons working for the International Federation such as staff made available by the National Societies members of the International Federation (i.e. persons seconded to the International Federation, called ‘staff-on-loan’).”

With respect in particular to the second complaint, the Federation cites the case law and recalls that in the context of recruitment processes the Tribunal has held that unsuccessful external applicants do not have a right of appeal to the Tribunal. It argues that at the time of her application for the position of Head of the Health and Care Department the complainant was neither a serving nor a former official of the Federation. Therefore, she had no right of access to the Federation's internal appeal mechanism to challenge a recruitment decision and likewise she has no access to the Tribunal in this matter.

According to the defendant any dispute between the Federation and a staff-on-loan which remains unresolved following negotiations may be referred to the Compliance and Mediation Committee established by the Constitution of the Federation or, alternatively, to arbitration.

On the merits of the first complaint, the Federation submits that the complainant was employed under a fixed-term contract which was due to expire on 31 October 2007 and that there was no obligation on its part to extend her assignment beyond this date. It argues that, as the complainant was working on secondment, any extension of her assignment was a matter for negotiation and agreement between the Federation and the German Red Cross. Furthermore, the decision to phase out the post to which she was assigned was made in the context of a restructuring process and was legitimate and within the Administration's discretion.

Concerning the complainant's allegations of misconduct, the Federation recalls that it commissioned an independent investigation which was comprehensive and conducted in full compliance with the applicable procedures and standards. The investigator found no evidence of harassment, defamation or any other act on the part of the complainant's supervisor in violation of the Federation's Code of Conduct.

With regard to the request for the disclosure of documents, the Federation states that the investigation report is a confidential document to which the complainant has no right under the applicable

rules. It considers that the release of such documents would infringe the privacy rights of the subjects of the investigations.

Lastly, it points out that the relief claimed by the complainant is unreasonable in view of her status as an employee of a National Society seconded to the Federation.

Regarding the second complaint, the defendant observes that appointment decisions are subject to limited review by the Tribunal and that in this case the selection process was conducted in full accordance with the Federation's procedures. It denies that it was tainted with a conflict of interest. The Federation adds that the investigation into the complainant's allegations revealed no evidence of malice or bias on the part of her supervisor.

D. In her rejoinders the complainant asserts that she was an employee of the Federation. Relying on the case law, she submits that the factual relationship of employer and employee is established through the actions taken by each party to an employment contract, notwithstanding the formality of or descriptive terms used in a written contract. She contends that she had a clear, contractual and substantial relationship with the Federation and that her complaints are therefore receivable. She explains that, were the Tribunal to consider them to be irreceivable, it would leave her with no effective remedy, given the immunity enjoyed by the Federation under Swiss law.

She argues that, in the event of non-extension of a fixed-term contract, there must be in accordance with the case law a definite decision which must be notified to the official concerned and founded on valid grounds of which the latter must be duly informed. She reiterates that the termination of her contract had nothing to do with the restructuring process. There was in fact no abolition of her post: she was simply replaced and her functions were assumed by a new staff member who was recruited externally to become the new Head of the PHE Unit. In connection with her second complaint she points out that there is no factual evidence that the Staff Selection Committee was properly formed.

E. In its surrejoinders the Federation maintains its position in full. It emphasises that as a staff-on-loan the complainant had no legal expectation of extension beyond the contractually agreed end date. It states that, contrary to the complainant's allegation, the transition manager did not replace her; indeed, he left the Federation on completion of his contract on 31 July 2008.

CONSIDERATIONS

1. It is argued that these complaints are beyond the Tribunal's competence, and, alternatively, they are irreceivable. Accordingly, it is appropriate that they be joined.

The questions as to competence and receivability raise only issues of law which are fully argued in the pleadings. Thus, the application for an oral hearing is rejected.

2. The complainant was seconded to the Federation as "staff-on-loan" by the German Red Cross with effect from 19 May 2003. The initial secondment was for six months. It was extended on three occasions, the last extension being from 1 November 2006 until 31 October 2007. The initial "Personal Data/Contract Information Sheet" indicates that the Federation was to pay up to the end of August 2003 the complainant's per diem and accommodation and to reimburse all costs to the German Red Cross from 1 September until 31 October 2003. The German Red Cross paid the complainant's salary. Her initial assignment was to a new position as Senior Officer for the Public Health in Emergencies Unit (PHE) in the Health and Care Department of the Federation. However, the duties of the position evolved over time and, in fact, if not by an official change in post description, she became Head of PHE and, no later than 16 April 2007, she was described in a Federation organigram as "Acting Unit Manager". Although there were discussions in 2006 with respect to obtaining core funding for the complainant's post, the German Red Cross continued to pay her salary throughout the period of her secondment, with the Federation paying monthly allowances. At the

end of her secondment, the complainant returned to the German Red Cross.

3. Towards the end of 2006 steps were taken to restructure the Health and Care Department. On 21 August 2007 the complainant lodged a grievance with the Federation complaining that her post as Head of PHE was to be abolished and that she had not been involved in the discussions as to the reorganisation of the PHE functions. She also complained as to the manner in which she had been informed that her position “w[ould] not feature in the future organigramme of the Health and Care Department, and therefore that her services w[ould] not be required beyond the limit of her current secondment”. On 31 October 2007 she expanded her grievance to include claims of harassment, misuse of power and defamation. On 28 February 2008 she filed an internal appeal with the Federation’s Joint Appeals Commission (JAC). On 26 June 2008 the JAC reported that her appeal was “outside of its scope and role”. The Secretary General advised her to that effect on 27 June 2008 and rejected her appeal. That decision is the subject of the first complaint.

4. After returning to the German Red Cross, the complainant applied for the position of Head of the Health and Care Department, which had been the subject of a vacancy notice issued on 21 December 2007. She was not shortlisted for the position. There were then various communications between her and the Federation and, on 18 July 2008, she was informed that she had “no rights to raise grievances or appeal under the [Federation’s] Staff Regulations”. That is the subject of the second complaint.

5. The Federation contends that neither complaint is receivable as at no time was the complainant either an official of the Federation or a former official. Rather, it is said, she was at all relevant times an employee of the German Red Cross with such rights as were accorded to her by German law. In this regard, the Federation points to various provisions of its Staff Regulations. Additionally, it points to the terms in which it recognised the Tribunal’s jurisdiction and in which the

Governing Body of the International Labour Office, the secretariat of the International Labour Organization (ILO), approved that recognition.

6. Article II, paragraph 5, of the Tribunal's Statute relevantly provides that:

“The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any [...] international organization [...] which has addressed to the Director-General a declaration, recognizing [...] the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure, and which is approved by the Governing Body.”

The consequence of that provision is that the Tribunal may hear the two complaints only if the complainant was, at the relevant times, an official of the Federation and the Federation has recognised the jurisdiction of the Tribunal.

7. By letter of 23 December 1997, addressed to the Director-General of the ILO, the then Secretary General of the Federation reported a decision of the General Assembly, that:

“[S]ubject to approval by the Governing Body of the International Labour Office, the International Federation will recognize the jurisdiction of the Administrative Tribunal of the International Labour Organization and will subscribe to its Statute, to hear complaints alleging non-observance, in terms of substance or form, of the provisions of a staff contract of employment or of the provisions of the Staff Regulations and other regulations established by the Secretary General. [...]

However, this acceptance of the Tribunal's jurisdiction does not extend to other categories of staff, for example, persons made available by the National Societies or persons employed locally by delegations of the Federation.”*

8. On 4 November 1998 the Secretary General of the Federation again wrote to the Director-General of the ILO, referring to the terms

* Registry's translation from French original.

in which the Federation accepted the Tribunal's jurisdiction and informing him that:

“As a consequence, the International Federation's acceptance of the Tribunal's competence does not extend to other categories of persons working for the International Federation such as staff made available by the National Societies members of the International Federation (i.e. persons seconded to the International Federation, called 'staff-on-loan') or individuals employed locally by the delegations of the International Federation.”

On 30 November 1998 the Director-General wrote to the Federation, referring to its letters of 23 December 1997 and 4 November 1998 and informing it that the Governing Body had “approved the Federation's recognition of the Tribunal's jurisdiction in accordance with paragraph 5 of Article II of the Statute of the Tribunal”. The letter continued:

“The Tribunal will accordingly be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the staff rules and regulations of the Federation to the extent set out in your above-referenced letters.”

9. Although the Federation contends that the complainant was not at any relevant time an “official”, it is convenient to deal first with the terms of its recognition of the Tribunal's jurisdiction. It may first be noted that the letter of 23 December 1997 indicating the Federation's preparedness to recognise the competence of the Tribunal does not refer to “officials”, but only to its preparedness to recognise jurisdiction “to hear complaints alleging non-observance [...] of the provisions of a staff contract of employment or of the provisions of the Staff Regulations and other regulations established by the Secretary General”. Again, without reference to “officials”, it indicates that the acceptance of the Tribunal's competence does not extend to “other categories of staff” which it identifies, albeit by example rather than by definition, as “persons made available by the National Societies or persons employed locally by delegations of the Federation”. That specification was, to some extent, clarified in its subsequent letter of 4 November 1998 defining persons made

available by National Societies as “persons seconded to the International Federation, called ‘staff-on-loan’”.

10. There can be no doubt that the Federation intended to exclude from the Tribunal’s jurisdiction those persons who were seconded to it by National Societies, called “staff-on-loan”, whether or not they were staff members of the Federation, as that expression is ordinarily understood, or “officials” within the meaning of Article II, paragraph 5, of the Tribunal’s Statute. Nor can it be doubted that that was so understood by the Governing Body of the ILO. In this respect, the letter informing the Federation of the Governing Body’s approval clearly indicated that the Tribunal would “be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the staff rules and regulations of the Federation to the extent set out in [the Federation’s] letters” (emphasis added). Accordingly, if the complainant was, at all relevant times, seconded to the Federation by a National Society and was a member of the category called “staff-on-loan”, the Tribunal lacks jurisdiction.

11. As earlier indicated, the complainant was initially seconded to the Federation in 2003, and her secondment was extended, from time to time, until 31 October 2007. Secondment does not necessarily preclude the person concerned from becoming a staff member of the organisation to which he or she is seconded (see Judgment 703). Thus, it is necessary to determine whether the complainant’s status was at all relevant times that of a person on secondment called “staff-on-loan”. In this respect, it is important to note that, by Article 1.2.1 of the Staff Regulations, “[the] Regulations apply to all categories of paid staff working at the Secretariat in Geneva and having concluded an employment contract with the Federation [there]after referred to as ‘staff members’, ‘staff’ or ‘employees’”. Article 2.1(t) of the Staff Regulations defines “staff-on-loan” as “staff employed by National Societies or other independent institutions who are on loan to the Federation, but have not concluded an employment contract with the Federation”. The words “hav[ing] concluded an employment contract

with the Federation” are important. Secondment is, in essence, a tripartite agreement which, ordinarily, involves an agreement between the person seconded and the receiving organisation, at least as to some matters. In context, the words “an employment contract with the Federation” must therefore be taken to refer to the contract by which the person in question has become an employee of the Federation and has ceased to be an employee of a National Society.

12. The complainant contends that she became a staff member of the Federation, for the purposes of Article 1.2.1 of the Staff Regulations, in November 2005 when a Manager of Human Resources wrote to her on Federation letterhead proposing “an extension of [her] fixed-term contract which expired on 31 October 2005” on the basis that “[a]ll other terms and conditions of employment remain unchanged”. The Federation contends that that was an “administrative oversight”. Whether or not that is so, there was then no concluded contract of employment with the Federation which could be extended. And the specification that all other terms and conditions were to remain unchanged indicates that it was not intended that one should then be concluded. Accordingly, the letter of 7 November 2005 did not effect a change in the complainant’s employment status. She remained “staff-on-loan” as defined in Article 2.1(t).

13. Although the Federation’s Code of Conduct defines “staff” to include “staff-on-loan” and, in paragraph 3.1, requires all staff “to [c]omply with the Staff Rules [and] Staff Regulations”, that document does not change the status of staff-on-loan to that of staff for the purposes of Article 1.2.1. Indeed, the specific reference to “staff-on-loan” as a separate category makes it clear that persons who have not concluded a contract of employment with the Federation remain staff-on-loan. And their right either to institute an internal appeal or to bring a complaint to the Tribunal is specifically dealt with by Article 12.1.4 and, under the heading of External Appeals, by Article 12.2.2 of the Staff Regulations. The former allows internal appeals “only with regard to allowances allegedly due by the Federation [...] or [...] the Federation’s review of the staff member’s

performance”. Article 12.2.2 concerning External Appeals specifically provides that staff-on-loan are excluded from the Tribunal’s jurisdiction.

14. As the complainant did not at any stage conclude an employment contract with the Federation, she remained staff-on-loan at all relevant times and, thus, the Tribunal is not competent to hear her first complaint.

15. Quite apart from the terms of the Federation’s acceptance of the Tribunal’s jurisdiction, the second complaint is also irreceivable. Whatever the relationship the complainant had with the Federation, it terminated on 31 October 2007 when her secondment came to an end. Thereafter, there was no basis on which she could claim to be an official of the Federation. Even if she had been a former official, there were then no terms of appointment and no Staff Regulations of which she could claim the benefit. Thus, the second complaint is irreceivable.

DECISION

For the above reasons,

The first complaint is dismissed as beyond the Tribunal’s jurisdiction and the second is dismissed as irreceivable.

In witness of this judgment, adopted on 7 May 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, Mr Giuseppe Barbagallo, Judge, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron
Seydou Ba
Giuseppe Barbagallo
Dolores M. Hansen
Patrick Frydman
Catherine Comtet