R.-G. (No. 4)

v.

International Federation of Red Cross and Red Crescent Societies

123rd Session **Judgment No. 3727**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr P. R.-G. against the International Federation of Red Cross and Red Crescent Societies (hereinafter "the Federation") on 27 May 2014 and corrected on 4 August, the Federation's reply of 13 November 2014, the complainant's rejoinder of 3 February 2015 and the Federation's surrejoinder of 11 May 2015;

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

Having examined the written submissions;

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

The complainant, whose post of Head of the Operations Support Department (OSD) was abolished following a restructuring exercise, challenges the new final decision taken by the Secretary General pursuant to Judgment 3208, concerning the complainant's second complaint, in which facts relevant to this case can be found.

In his second complaint, the complainant challenged his dismissal. Having examined his internal grievance against the decision to dismiss him, the Joint Appeals Commission (hereinafter "the Commission") had reached four key conclusions. In particular, it had found that the complainant had wrongly been subject to a "post is cut" procedure and that his post should have been treated as a "post evolved". It had also found that the Administration 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 Commission had 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. On 25 November 2010 the Secretary General had rejected the first recommendation and accepted the second one. In Judgment 3208, delivered in public on 4 July 2013, the Tribunal considered that it was "not possible to ascertain from the Secretary General's letter of 25 November 2010 the basis upon which he [had taken] the position that he '[did] not accept the findings, interpretations and conclusions' of the Commission". It therefore set aside the 25 November decision insofar as it rejected the recommendation to reinstate the complainant and sent the case back to the Federation for the Secretary General to "explain why he adopted the approach he did". Having received no new final decision on 20 January 2014, the complainant filed an application for execution of Judgment 3208. In Judgment 3567 the Tribunal considered that the Secretary General's task to comply with the order in Judgment 3208 should not have taken over six months and awarded the complainant moral damages on that account.

The new final decision, issued on 27 February 2014, in which the Secretary General motivates his decision to reject the Commission's recommendation to reinstate the complainant in a position of similar grade, on the ground that the Commission committed errors of fact and law, is the decision impugned in the present complaint.

The complainant asks the Tribunal to order the Federation to pay him two years' gross salary in lieu of reinstatement, with all benefits, step increases, pension contributions and other emoluments, for the wrongful termination of his contract. He seeks damages for the injury to his mental and physical health, as well as moral and exemplary damages as his post was wrongly made redundant. He seeks compensation for "non-salary entitlements" for two years including school fees and insurance, exemplary damages for the Federation's delay and failure to act in good faith in executing Judgment 3208, as well as costs, with interest on all

sums awarded. The complainant requests the Tribunal to order the production of documents relating to the abolition of his post.

The Federation submits that the complaint is unfounded.

CONSIDERATIONS

1. The complainant was employed by the Federation until 2010. His contract was then terminated on the basis that his position was redundant. He successfully challenged before the Tribunal the final decision of the Secretary General of 25 November 2010 to reject recommendations of the Commission that, amongst other things, the complainant be reinstated (see Judgment 3208). The Tribunal was satisfied the Secretary General had not adequately explained his reasons for rejecting the Commission's recommendations. The decision was set aside and the matter remitted to the Federation for the Secretary General to make a new decision. That occurred on 27 February 2014 and the Secretary General again rejected the recommendations of the Commission. It is this decision which is impugned in these proceedings. It should be noted that the complainant sought the execution of Judgment 3208 and was, in certain respects, successful (see Judgment 3567).

2. Much of the relevant background is set out in Judgment 3208 and it is unnecessary to repeat it. In these proceedings, the complainant does not seek an order of reinstatement but rather compensation for lost income and other benefits (including non-salary entitlements) for the period January 2010 to December 2012, damages for injury to his physical and mental health, moral and exemplary damages, legal expenses and interest. This is to be contrasted with the relief sought in the proceedings leading to Judgment 3208 in which the complainant sought an order for reinstatement.

3. The complainant advances five contentions. The first is that the Secretary General did not substantiate or sufficiently justify his decision of 27 February 2014 to reject the Commission's recommendations. The second is that the decision abolishing the complainant's post

leading to the termination of his employment was taken in breach of the Federation's procedural rules, involved essential facts being overlooked and constituted an abuse of authority. The third is that the Federation failed to offer the complainant a transfer to another post in the Secretariat once his post became redundant. The fourth is that the Federation failed to fulfil its duty of care and treat the complainant fairly and with respect for his dignity during the redundancy process. The fifth is that the complainant was entitled to additional compensation in view of the excessive delay in completing the internal appeal process. The Tribunal will address, in turn, each of these contentions and the Federation's response. In so doing reference will be made to matters of factual detail relevant to each contention.

4. There is an overlap between the first contention and the second contention. The organisational changes which resulted in the creation of the Disaster Services Department (DSD) and the concomitant need to have a Head of DSD were the product of a restructuring exercise called "Moving Forward Together". In aid of that restructuring exercise, a set of "Human Resource Principles and Policies" (the HR Principles and Policies) were developed and embodied in a document dated 1 July 2009. An element of them involved a determination of whether a post had been cut, on the one hand, or evolved, on the other. In relation to the complainant, this analysis entailed an assessment of whether the position he held immediately before the restructuring exercise, the Head of the Operations Support Department (OSD) had been "cut", in which case a redundancy situation would arise, or whether his subsisting position had "evolved", in which case the complainant would remain in his post with a new title and a new job description. This distinction was of fundamental importance to the way the circumstances of the complainant should have been approached and, as it emerged, a matter in respect of which there was a critical difference of opinion between the Commission and the Secretary General. It can be inferred that the latter's views were informed by the views of the Human Resources Department (HRD).

5. In its initial report of 31 July 2010, the Commission concluded the position held by the complainant, Head of OSD, should have been treated as "post evolved". It is to be recalled that on 18 August 2010, the Secretary General addressed, by e-mail, nine questions to the Commission or, put slightly differently, raised nine issues. In various ways several of the questions or issues addressed why the Commission had reached this conclusion. Quite expressly, the third concerned, to use the language in the e-mail, the "question of post evolved versus post cut". The Secretary General said:

> "I am curious as to why you did not take into consideration the facts and analysis made by Management (including by [the complainant] himself) in July 2009, and recalled by the Head of Human Resources in her email dated 9 February 2010 and her written response to the Panel. Similarly, were either Human Resources or Legal queried on their analysis of this job cut?"

6. The Commission's reply of 30 September 2010 made it clear that while it had taken into account the position of "management" involving a focus on the merger of three positions into one, it also had undertaken a detailed assessment (in a document entitled "Mapping of evolvement of [OSD] functions from January 2004 to July 2009") of the evolution of OSD in a period commencing in 2004, when the complainant commenced as Head of OSD, to 2009. Also, in its reply, the Commission referred to the response provided to the Commission by HRD and challenged some of the premises underlying that response.

7. It is to be recalled that in considerations 10 and 11 of Judgment 3208 the Tribunal observed that the Secretary General had said that he "[did] not accept the findings, interpretations, and conclusions" of the Commission but had not provided adequate reasons as to why this was so. In the impugned decision of 27 February 2014 and in these proceedings, the Secretary General divided his analysis by reference to three propositions. The first was that the Commission "makes conclusions of fact which are unsubstantiated in finding that the Federation failed to correctly apply the 'post is evolved' process". In substance, the remainder of the detailed discussion in relation to this first proposition concerns what the Commission did not do. It was said not to have articulated grounds for reaching the conclusion it did, not to have provided an

explanation of why, in the context of the reorganisation and its detailed elements, "the post cannot be considered cut and replaced", not to have discussed the explanation of people it had spoken to and reveal why those explanations had not been accepted, and not to have offered any explanation as to why specified key elements of the job description of Head of DSD were not noted or taken into account.

8. In its reply, the Federation speaks of the Secretary General, in his letter of 27 February 2014, as having "provide[d] the Tribunal with the information it requested in order to adjudicate this case and dismiss the complaint. The [letter] fully justifies the Federation's decision to not accept the [Commission's] [r]ecommendations to reinstate the [c]omplainant in a post at a similar grade." A similar theme emerges in the surrejoinder. This approach is mistaken.

9. It is true, as mentioned earlier, that in Judgment 3208 the Tribunal discussed the Secretary General's failure to explain why he had taken the position that he rejected the findings, interpretations and conclusions of the Commission. But this discussion flowed from the approach taken (and words used) by the Secretary General in the earlier impugned decision. The Tribunal's observations were not intended to mark out the boundaries of what is required by the executive head of an organisation (or a person acting on her or his behalf) in providing reasons for a conclusion which is at odds with the conclusions and recommendations of an internal appeal body. It is not sufficient to explain why, in the opinion of the executive head of the organisation, the internal appeal body approached an issue in a way that was flawed. It is also necessary to explain the basis on which the conclusion actually reached by the executive head of the organisation was arrived at if it was different to the conclusion of the internal appeal body (see, for example, Judgments 2278, consideration 9, 2347, consideration 14, and 2699, consideration 24). In the present case, it was necessary for the Secretary General not simply to identify perceived flaws in the reasoning or procedures of the Commission said to undermine its conclusion that the post had evolved but, in addition, to explain his reasons for the conclusion that the post had been "cut". This leads to consideration of whether, in

all the circumstances, the impugned decision sufficiently explained this latter conclusion.

10. The basic thesis of the Federation has always been that there were material differences between the duties and responsibilities of the Head of OSD and the duties and responsibilities of the Head of DSD. The analysis of the Commission led to a conclusion there had been no substantial changes to the duties of the post of Head of OSD and thus that the post had evolved. Accepting, for present purposes, that the criticisms of the Secretary General of the methodology adopted by the Commission are well founded, it was nonetheless incumbent on the Secretary General to demonstrate, in the impugned decision, that a comparison of the duties and responsibilities of the Head of OSD with those of the Head of DSD justified a conclusion that either the former post no longer existed or that the responsibilities of the post had substantially changed such that the qualifications to handle the job had changed. This is the language used in the HR Principles and Policies. In either event it would be legitimate to conclude that the post (of Head of OSD) had been "cut". No such comparison is explicitly made by the Secretary General in the impugned decision of 27 February 2014. Differences are certainly alluded to obliquely in that decision as part of the analysis of the Commission's methodology to demonstrate that it was flawed. But they are mostly alluded to as part of a discussion about aspects of the new position (Head of DSD) that were not, or not adequately, addressed by the Commission in the opinion of the Secretary General. However the complainant was entitled to a more complete explanation of why his position had been "cut" which should have involved a more thorough or detailed comparison of the duties and responsibilities of the position he then held as Head of OSD and that of the new position, Head of DSD. Accordingly, the Tribunal is satisfied that the impugned decision does not meet the requirements established by the Tribunal's jurisprudence. For this the complainant is entitled to further moral damages. In circumstances where the complainant no longer seeks an order for reinstatement and does not explicitly seek an order that the impugned decision should be set aside, no relief beyond moral damages will be granted. Those damages are assessed in the sum of 6,000 Swiss francs.

11. The second contention of the complainant is that the decision abolishing his post and leading to the termination of his employment was taken in breach of the Federation's procedural rules, involved essential facts being overlooked and constituted an abuse of authority. The gravamen of this contention is that, as already discussed, a comparison of the duties and responsibilities of the Head of OSD and those of the Head of DSD should have led to a conclusion that the former position had not been "cut", as provided for in the HR Principles and Policies and that by reference to that document as well as Article 11.3.1 of the Federation's Staff Rules, a redundancy situation had not arisen.

12. Of some significance in assessing this contention was a meeting between the Under-Secretary General for Disaster Response and Early Recovery (DRER) and the Head of HRD with the complainant on 23 July 2009. OSD and the proposed DSD were within DRER Division. The Head of HRD summarised what was discussed at the meeting in an e-mail of the same date to another official who was going to be acting in her place during her absence. The e-mail included the observation that "[the complainant] accepted during the discussion that indeed the job had changed substantially". This was after the Head of HRD had explained to the complainant, as noted in the e-mail, the main parameters of the changes to satisfy the complainant that it was a different job. The e-mail also noted that it was agreed, at the request of the complainant, that the job description of the new position not refer to recent field experience in order, it can be inferred, to enhance the complainant's prospects when applying for the position. The Tribunal notes that on the same day (23 July 2009) a letter was written to the complainant informing him that his post of Head of OSD would be "cut". On 5 August 2009 the complainant signed the letter acknowledging its receipt. He did not then or until the new position was filled, challenge this contention.

13. The Federation referred to this meeting of 23 July 2009 and the internal note in its reply as evidence that the complainant accepted that the Head of DSD was a new position and that, in the circumstances, it was appropriate to treat his existing position as one which was to be "cut". In his rejoinder, the complainant does not dispute that was then

his position. However he seeks to avoid a conclusion that his position should have been treated as "cut", because it only emerged later that some aspects of the functions of the new DSD (food security and livelihoods) had been transferred to another department, that a new position on recovery had been opened in DSD, and that "the policy dimension was not a key requirement for the new position". As to this last mentioned point, it does not sit comfortably with the contents of an e-mail of 3 August 2009 from the Under Secretary General of DRER to the complainant annexed to the Federation's reply in which it is recorded that the complainant had said at the 23 July 2009 meeting that the new position had a policy focus which impacted on the need for field experience. What is said in this e-mail is not challenged by the complainant in his rejoinder. Moreover the Federation demonstrates persuasively in its surrejoinder that the points of distinction now relied upon by the complainant do not establish that the post held by the complainant had simply "evolved". There were material differences between the position of Head of OSD and the Head of DSD including, as to the latter, responsibilities in relation to recovery and livelihood and food security from an operational perspective. The fact that a position concerning livelihood had been created in another department (the Community Preparedness and Disaster Risk Reduction Department (CPDRR)), did not dictate a conclusion that this area of activity was not a material part of DSD to be overseen by the Head of that Department. It was.

14. Also of some significance is that the complainant applied for the position of Head of DSD and there are no contemporaneous records or other evidence furnished by the complainant which suggest that he did so in circumstances where he challenged the decision to open this position for limited competition on the basis that it reflected his existing position (with some changes), which would have justified the characterisation of his position as having "evolved" rather than having been "cut". It was only after the complainant failed to secure appointment to the position of Head DSD that the Federation's rationale for creating and filling the new position by competition was put in issue by him. The Tribunal rejects the complainant's second contention.

15. The complainant's third contention is that in a situation where his employment was going to be terminated for redundancy, the Federation failed to offer him alternative employment or, indeed, failed to make any efforts to find him alternative employment within the Federation. The essence of the Federation's response is to say, as it did in a heading on this topic in its reply, "[t]he Federation did not fail to offer the complainant another position, as he was not interested in any alternative position other than the newly created merged position [Head of DSD]" and in the ensuing paragraphs: "a number of family positions in the field were suited for the [c]omplainant's skills and experience, but the [c]omplainant did not apply or manifest an interest in these positions". Earlier in its reply when recounting the facts, the Federation does acknowledge that the complainant expressed interest in a number of positions but the Federation offers a reasonable explanation in its pleas as to why they were not available or not suitable. What the Federation does not do in its pleas and evidence is to demonstrate that it corresponded or otherwise communicated with the complainant about specific available positions encouraging the complainant to apply for or pursue them or to demonstrate that, at the time, it undertook any sort of analysis of positions which might, at least potentially, have been positions to which the complainant might be transferred as contemplated by Article 11.3.2 of the Staff Regulations. It was not sufficient for the Federation to take the approach, as it apparently did, that it was incumbent on the complainant to identify other positions for which he might be suitable and then apply for those positions. The Federation bore the onus of showing the complainant was not able to remain in the Federation's service in some capacity (see Judgment 2830, consideration 9). A much more active role was required of the Federation in circumstances where a long-serving member of staff towards the end of his career was facing the prospect of his employment being terminated because of redundancy. The Federation's obligations have been described as requiring it to do "its *utmost* to find [an official facing redundancy] a post which matched his skills and level of responsibility" (emphasis added) (see Judgment 2090, consideration 7). The Federation failed in its duty towards the complainant and, in this respect, the complainant is entitled to moral damages.

16. The complainant's fourth contention is that he was not treated fairly and with respect for his dignity during the redundancy process and in the period leading up to the termination of his employment. This contention significantly overlaps, in terms of argument and the factual foundation, with the third contention just discussed. To this extent, it is addressed by the pleas of the Federation in its reply. However as to some matters of detail concerning the way the complainant was treated (but not related to the question of finding other employment within the Federation for the complainant), there is no specific argumentation in rebuttal in the Federation's reply. Accordingly, the Tribunal accepts what is said by the complainant in relation to those matters of detail and that they might be viewed as an affront to his dignity. But neither individually or collectively do these matters of detail evidence a serious affront for which significant moral damages should be awarded. However they are taken into account in assessing the moral damages arising from the Federation's failure to appropriately address the issue of finding other employment for the complainant before taking the ultimate step of terminating his employment as discussed in the preceding considerations. Those moral damages are assessed in the sum of 60,000 Swiss francs.

17. The fifth and last contention of the complainant is that he is entitled to further compensation because of the delay in the internal appeal process. The actual time taken for the internal appeal leading to the first impugned decision of 25 November 2010 was not excessive. Ordinarily damages for delay are awarded where the process of internal appeal has been excessively lengthy and the period taken could have been less. In the present case, much of the delay has arisen as a result of the complainant successfully challenging the legality of steps taken by the Federation in dealing with his grievance. Moreover, the complainant was awarded moral damages in Judgment 3567 because of the delay on the part of the Federation in complying with Judgment 3208. No basis is made out for a further award of moral damages for delay.

18. Two procedural issues should be addressed. One is a request by the complainant that the Federation produce certain documents. The request is expressed at a high level of generality and can properly be

characterised as a "fishing expedition" (see, for example, Judgment 3419, consideration 6), and, for that reason, should be rejected. The second procedural issue is a request by the complainant for an oral hearing. The Tribunal is satisfied that the complaint can be fairly and appropriately determined by reference to the written material filed by the parties. Accordingly, no order is made for an oral hearing.

19. The complainant has been successful, in part, in these proceedings and is entitled to an order for costs which the Tribunal assesses in the sum of 6,000 Swiss francs.

DECISION

For the above reasons,

1. The Federation shall pay the complainant 66,000 Swiss francs as moral damages within 30 days of the public delivery of this judgment.
2. The Federation shall pay the complainant 6,000 Swiss francs as costs within 30 days of the public delivery of this judgment.
3. Interest shall accrue at the rate of 5 per cent per annum on the above amounts for any period in which the amounts required to be paid by orders 1 and 2 remain unpaid after 30 days from the public delivery of this judgment.
4. All other claims are dismissed.

In witness of this judgment, adopted on 24 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ