

107th Session

Judgment No. 2853

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. B. B. against the International Federation of Red Cross and Red Crescent Societies (hereinafter “the Federation”) on 22 June 2007, the Federation’s reply of 14 December 2007, the complainant’s rejoinder dated 7 April 2008 and the Federation’s surrejoinder of 15 July 2008;

Considering Articles II, paragraph 5, and VII 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, a Spanish national born in 1948, is the former Head of the Federation’s Risk Management and Audit Department. He joined the Federation on 7 January 2002 under a fixed-term appointment and on 1 January 2005 he was granted an open-ended contract. On 13 July 2007 his appointment was terminated with effect from 31 December 2007.

On 20 January 2005 the complainant proposed to the Secretary General, his then second-level manager, new objectives for his 2005 annual appraisal. On 2 March 2006 he submitted his performance self-assessment for 2005, indicating that he had “fully achieved expectations” – which corresponds to a rating of 3.

On several occasions in 2005 the complainant had expressed the view that he ought to be able to decide who was to have access to the reports of the Risk Management and Audit Department; in particular, he considered that he ought to be able to report directly to the Federation’s Governing Board. The Secretary General did not share his view of the internal audit function and its reporting lines and told him so in a memorandum dated 7 March 2006. This disagreement then came to a head when the complainant submitted the report of that department to the Finance Commission without attaching the Administration’s comments, which the Secretary General had to present separately two days later. On 13 April 2006 he issued the complainant a written warning regarding, on the one hand, his conduct in connection with the distribution of this report and, on the other hand, his performance in general. Referring to Article 11.2 of the Staff Regulations concerning termination of appointment for unsatisfactory performance, he gave the complainant three months to improve his performance.

On 24 October 2006 the Head of the Human Resources Department informed the complainant that he would receive a merit-based salary increase of 0.5 per cent. This increase corresponded to a rating of 2, indicating that the complainant had “partially achieved expectations” with regard to his performance in 2005. On 14 November 2006 the complainant initiated the Grievance Procedure in order to challenge this rating. A conciliatory meeting with the Secretary General was held on 18 January 2007, but the complainant did not obtain satisfaction. On 30 January the Secretary General approved the objectives which the complainant had proposed for his 2005 performance appraisal.

On 15 February 2007 the complainant wrote to the Secretary General challenging the rating of his 2005 performance and requesting

that the matter be referred to the Joint Appeals Commission. In an e-mail of 25 May sent to the Registry of the Tribunal and copied to the Secretary General, he stated that he had exhausted the Federation's internal appeal procedure and that he wished to file a complaint. In a letter of 12 June addressed to the complainant the Secretary General expressed surprise at the decision to refer the matter to the Tribunal, given that his appeal was "on-going". By letter of 19 June the Secretary of the Joint Appeals Commission informed the complainant of the composition of the panel that had been set up to examine his appeal. On 20 June 2007 the complainant submitted his appeal brief to the Secretary of the Commission and on 22 June he filed this complaint with the Tribunal challenging the implied rejection of his appeal.

In its report of 9 October 2007 the Commission considered that the rating of the complainant's performance was tainted with procedural irregularities. It recommended that the 2005 appraisal should be based on his self-assessment, i.e. a rating of 3, and that his salary should be adjusted retroactively. In view of the circumstances of the case, and particularly the delay in resolving the matter, the Commission also recommended that the parties should seek a "mutually agreed and realistic compensation arrangement". However, no agreement could be reached regarding the compensation. On 13 December 2007 the complainant was notified that the Secretary General had decided to change retroactively his 2005 performance with a rating of "fully achieved expectations" and to request that his salary increase be corrected accordingly, and that the letter of 24 October 2006 be removed from his employment file.

B. The complainant considers that he has exhausted the internal means of redress and that, since the Secretary General failed to take a decision within sixty days following his request of 15 February 2007, he is entitled to refer the dispute to the Tribunal. He contends that he did not receive a fair assessment of his 2005 performance. His objectives should have been set jointly with his manager at the beginning of the year. The complainant submitted them to the Secretary General in January 2005, but they were not formally approved until 30 January 2007. Referring to statistics which reflect

the average rating of staff working in the Federation's Secretariat, the complainant submits that the Secretary General failed properly to justify and substantiate the very low rating he gave him, whereas the self-assessment he proposed in March 2006 was supported by evidence of achievement. He asserts that, based on the high-quality reports he submitted on the audits and assignments listed in his self-assessment, "any independent source is able to confirm the rate of fulfilment of [his] objectives", in spite of the lack of resources which he repeatedly reported in 2005.

The complainant requests that the Secretary General's decision to rate his performance in 2005 as "partially achiev[ing] expectations" be set aside and that his salary increase be adjusted accordingly. He asks that the negative appraisal for 2005 as well as any document alleging misconduct or shortcomings in his performance be removed from his employment file.

C. In its reply the Federation objects to the receivability of the complaint on the grounds that it was filed before the internal remedies were exhausted. It stresses that difficulties were encountered in reconstituting the Joint Appeals Commission after the departure of four of its members and notes that the Secretary General's letter of 12 June 2007 to the complainant stated that the appeal was still pending. In submitting a new appeal to the Commission on 20 June 2007 against the same decision and in the same form as on 14 February 2007, the complainant implicitly acknowledged that his complaint to the Tribunal was directed against the decision that would be taken once the Joint Appeals Commission had examined his appeal. The defendant also points out that, after the Commission had delivered its report, the complainant refused any negotiation regarding a possible compensation agreement and threatened to pursue his claims before the European Court of Human Rights and United States courts. In addition, it submits that the Secretary General's decision of 13 December 2007 – which is the final decision on the complainant's "second" appeal – satisfied all of the complainant's claims. They have therefore become moot.

Subsidiarily, the Federation contends that the decision not to accept the complainant's self-assessment and rating was not arbitrary. It submits that he was unwilling to follow the Secretary General's instructions and that he did not provide the support expected from him to the Secretary General or the Finance Commission. According to the Federation, the decision to rate the complainant's performance as "partially achiev[ing] expectations" was taken "after a long exchange of notes and discussions between the Secretary General and the complainant starting in January 2005 i.e. well before the submission of the proposal of self-assessment dated 2 March 2006", thus giving ample opportunity to the complainant to express his views. Moreover, there were good reasons for the complainant's performance rating: his requests for additional human and financial resources were excessive, he refused to accept the solutions proposed by the Secretary General and he insisted that he be allowed to distribute his reports to internal and external parties without previously submitting them to the Secretary General, contrary to the terms of the Internal Audit Charter.

D. In his rejoinder the complainant submits that, because of the Secretary General's failure to reconstitute the Joint Appeals Commission and to refer his appeal to it in a timely fashion, he had no other option but to file a complaint with the Tribunal. He denies having refused to negotiate a compensation agreement; on the contrary, he requested and attended a conciliatory meeting.

He contends that, rather than pursuing formal disciplinary charges against him for misconduct, the Federation gave him a negative rating in order to retaliate against him for expressing disagreement with the Secretary General and for uncovering the serious limitations placed on the activities of the Risk Management and Audit Department, mismanagement in the Secretariat and violations of the Financial Regulations. He alleges that consequently his negative rating amounts to a disguised disciplinary measure and that he was not afforded the due process guarantees foreseen in the Staff Regulations of the Federation, the Code of Conduct for all Staff of the Federation Secretariat and the Tribunal's case law.

He asserts that he did provide support to the Secretary General and the Finance Commission, but that they chose to ignore his repeated warnings and not to convey them to the governing bodies of the Federation. In his view, it was his responsibility as Head of the Risk Management and Audit Department to decide who should receive his reports and, in accordance with the Internal Audit Charter, his job description, and the Code of Ethics for Internal Auditors, to inform the governing bodies of any significant limitation placed on the activities of his department. He also states that he never had an opportunity to discuss his performance rating with the Secretary General prior to submitting his appeal, despite his repeated requests. Lastly, he asks the Tribunal to order the Federation to produce various documents.

E. In its surrejoinder the Federation disputes the relevance and accuracy of the complainant's account of events and denounces his attempt to "extend the scope of the matter" to periods which are not material to the issue of his performance appraisal. It reiterates that the complaint is irreceivable. It provides the copy of an e-mail exchange between the complainant and the Secretary General which shows, in its view, that the latter was dissatisfied with the complainant's performance, and some of the documents requested by the complainant in the rejoinder, indicating that other documents can be made available to the Tribunal but not to the complainant for confidentiality reasons.

CONSIDERATIONS

1. The complainant is a former staff member of the Federation. He was Head of the Risk Management and Audit Department for a period of almost five and a half years until his appointment was terminated on 13 July 2007 in the circumstances set out in Judgment 2854, also delivered this day, on the complainant's second complaint.

2. On 24 October 2006 the Head of the Human Resources Department informed the complainant that he had been granted "a 0.5% merit increase in the range that applied for [his] 2005

performance rating”. The increase was based on a rating of “partially achieved expectations”. The complainant, who had formulated his proposed performance objectives in January 2005, but had not discussed them with the Secretary General, had rated his own performance as having “fully achieved expectations”.

3. The difference between the complainant and the Secretary General as to the former’s performance rating was not resolved in subsequent grievance proceedings and, on 15 February 2007, the complainant filed an internal appeal. Having received no response, the complainant sent an e-mail to the Registry of the Tribunal, on 25 May 2007, which was also copied to the Secretary General, stating that he wished to file a complaint. He did so on 22 June 2007, seeking the setting aside of the “partially achieved expectations” rating in his 2005 performance appraisal, the substitution of this rating by a “fully achieved expectations” rating, retrospective adjustment of salary and removal from his employment file of the negative appraisal and other documents alleging misconduct and shortcomings in his performance.

4. In the meantime, on 12 June 2007 the Secretary General wrote to the complainant expressing surprise at his having filed a complaint with the Tribunal and explaining that the delay of more than three months in referring his appeal to the Joint Appeals Commission was the result of its not having been fully constituted in that period. As it happened, the complainant was informed by letter of 19 June 2007 that a panel had been formed on 13 June 2007 to consider his internal appeal and, the parties having filed their submissions, the appeal proceeded to finality. After receiving the report of the Joint Appeals Commission, the Secretary General wrote to the complainant on 13 December 2007 informing him that he had decided to substitute a “fully achieved expectations” rating for the one in dispute and that his salary would be adjusted accordingly. Additionally, he informed the complainant that there was no correspondence or other documents applicable to his 2005 performance rating in his employment file, except for the letter of 24 October 2006 informing him of his salary increase and his internal

appeal, and that the letter of 13 December 2007 would be substituted for the letter of 24 October 2006.

5. The Federation filed its reply in these proceedings on 14 December 2007 contending, amongst other things, that the complaint is irreceivable on the basis that the complainant filed his appeal brief with the Joint Appeals Commission on 20 June 2007. It also contends that the complaint is irreceivable on the ground that the complainant's claims have been fully satisfied. The Federation does not contend that, when he filed his complaint, the complainant had failed to exhaust the internal remedies then available to him. Nor does it deny that he falls within Article VII, paragraph 3, of the Tribunal's Statute which allows for a complaint to be brought directly to the Tribunal if no decision has been made within sixty days of the notification of a claim. Rather, what it contends, in effect, is that, by filing his submissions with the Joint Appeals Commission, the complainant elected not to proceed with his complaint before the Tribunal.

6. It is fundamental that a litigant cannot pursue the same claim before different adjudicative bodies at the same time. Normally, the litigant will be forced to elect the forum in which he or she intends to proceed. That did not happen in the present case. Nonetheless, the complainant pursued his internal appeal to finality and, thus, must be taken to have elected to pursue internal remedies rather than to proceed at that stage before the Tribunal on the basis of an implied rejection of his internal appeal. However, that does not mean that the complaint is irreceivable.

7. The earliest date at which the complainant can be taken to have elected to pursue internal remedies is 19 June 2007 when he was informed that the Joint Appeals Commission had been formed to consider his appeal. His complaint had already been filed and it was receivable pursuant to Article VII, paragraph 3, of the Statute. Moreover, he then had a cause of action, as his claim was not satisfied until 13 December 2007.

8. Even though the complaint became without object on 13 December 2007, it was receivable when filed and the complainant then had a cause of action. Accordingly, he is entitled, in these circumstances, to the costs associated with its filing, even though not requested in the complaint. However, he is not entitled to costs in respect of subsequent pleadings which were filed after his decision to pursue his internal appeal. There will be an award of costs in the amount of 500 Swiss francs, but the complaint must otherwise be dismissed.

DECISION

For the above reasons,

1. The Federation shall pay the complainant's costs in the amount of 500 Swiss francs.
2. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 14 May 2009, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba
Mary G. Gaudron
Dolores M. Hansen
Catherine Comtet