

107th Session

Judgment No. 2854

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr R. B. B. against the International Federation of Red Cross and Red Crescent Societies (hereinafter “the Federation”) on 19 March 2008 and corrected on 21 April, the Federation’s reply of 5 August, the complainant’s rejoinder of 18 November 2008, the Federation’s surrejoinder of 20 February 2009, the complainant’s additional submissions dated 23 March and the Federation’s final observations thereon of 23 April 2009;

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. Facts relevant to this case are given in Judgment 2853, also delivered this day, concerning the complainant’s first complaint. Suffice it to recall that the complainant is the former Head of the Federation’s Risk Management and Audit Department. From 7 January 2002 he served under a fixed-term appointment and he was granted an open-ended contract on 1 January 2005.

In September 2004 the complainant addressed the report of the Risk Management and Audit Department to the Federation's Finance Commission. In that report, he summarised the recommendations which had been issued by that department since January 2002 but not implemented by the Secretariat.

In January 2005 he drew the Secretary General's attention to the lack of human and financial resources allocated to his department, and he requested that the position of internal auditor which had become vacant in November 2004 be filled, that two more internal auditors be recruited and that additional funds be made available to finance external audits. The Secretary General replied that, due to budgetary restrictions, the Secretariat could not fund the requested recruitments, but that part of the funds designated for the Federation's Tsunami Programme could be used to finance either an auditor position for 2005 or external audits in relation to this programme. In an e-mail of 14 February 2005 to the Secretary General the complainant explained that he considered that the timely recruitment, suitability and independence of auditors would be compromised if the positions were to be filled by means of short-term contracts funded by a programme rather than by the Secretariat. In submitting the report of the Risk Management and Audit Department to the Finance Commission in September 2005, the complainant indicated that the reduction of internal auditors prevented his department from satisfactorily performing its duties. He asked the Secretary General to convey that report to the Governing Board. The Secretary General refused to do so; however, on 27 October 2005 he approved the recruitment of two internal auditors, one in 2006 and one in 2007.

From mid-2005 the Risk Management and Audit Department had led an investigation into allegations of mismanagement in one of the National Societies. At that time, an external firm was carrying out an audit of the same National Society. In November 2005 the complainant communicated the internal investigation draft report to a number of staff members for comments. He also recommended that the external audit report be shared with donors who supported the National Society in question. In a memorandum of 7 March 2006 the Secretary General expressed discontent over the complainant's advice to share

the investigation and audit reports with donors. Attached to the memorandum was a Note of 3 March on the Distribution of Audit and Investigation Reports. Replying to the memorandum, the complainant challenged the Secretary General's comments.

On 16 March 2006 he sent the report of the Risk Management and Audit Department to the Secretary General, indicating that it would be submitted to the Finance Commission and the Governing Board the following week. He was advised that the Secretary General wished to discuss the content of the report with him prior to its submission to the Finance Commission. He had a meeting with the Secretary General on 24 March, and on 27 March he distributed the report to the members of the Finance Commission and informed the President of the Federation of its content. Two days later, the Secretary General presented to the members of the Finance Commission his comments on the report, stating his disagreement with the complainant on a number of issues, including the distribution of documents and the lack of human and financial resources allocated to the Risk Management and Audit Department. In a letter of 11 April 2006 the Chairman of the Finance Commission expressed, on behalf of its members, the Commission's full agreement with the Secretary General's opinion regarding the distribution of documents, and encouraged him to amend the Internal Audit Charter and "take such steps necessary to minimize the risks which could result from the conduct of work by the internal audit department".

By a letter of 13 April 2006 the Secretary General notified the complainant of his decision to give him a written warning. He considered in particular that, in distributing the report to the members of the Finance Commission, the complainant had ignored his instructions and engaged in misconduct. He gave him ten days to respond to the charges, after which the warning would be confirmed, and indicated that if the complainant again ignored or contravened his instructions, his employment would be terminated with immediate effect. Referring to Article 11.2 of the Staff Regulations concerning "termination of engagement" for unsatisfactory performance, the Secretary General also gave the complainant three months to improve his performance. The complainant replied in detail to the Secretary

General's charges on 28 April. Having met the complainant on 14 July, the Secretary General informed him by letter of 24 July 2006 that, although he found that the allegation of misconduct was substantiated, he had decided not to take any disciplinary or administrative steps "at [that] stage".

By an e-mail of 25 October 2006 the Secretary General sent the complainant a revised and annotated Internal Audit Charter for comment. On 20 November the complainant transmitted his comments to the Secretary General and, separately, to the President of the Federation, stating his disapproval of the revised Charter. He objected in particular to the proposed restriction of the Risk Management and Audit Department's access to the Governing Board.

In the meantime, in the second half of 2006 an external firm had been commissioned to perform an audit of the Tsunami Programme. On 19 March 2007, a few months after the external firm had issued its audit report, the complainant sent an e-mail to the Secretary General in which he pointed out that the report contained substantive errors and requested that an amended version of the report be issued. He forwarded that e-mail to the President on the same day. Having considered both the external audit report on the Tsunami Programme and the comments submitted by the complainant, the Finance Commission noted in its own report of April 2007 the differences of opinion between the complainant, the Secretary General and the external firm, and it concurred with the Secretary General's views. It also recommended that the latter take "concrete steps to improve the effectiveness of the risk management and audit function" and that the Governing Board establish a Federation-wide audit and risk management advisory body or, in the alternative, that the audit and risk management body be established as a subcommittee of the Finance Commission. Shortly thereafter, the complainant submitted to two representatives of National Societies, one of which was a member of the Governing Board, his proposals concerning, particularly, the setting up of a separate audit and risk management committee. An exchange of e-mails ensued in which the complainant forwarded to one of the representatives his e-mail of 19 March 2007 to the Secretary General. At its 15th session in May 2007 the Governing Board

requested that the Secretary General strengthen the Risk Management and Audit Department taking into account the observations formulated in the external audit report on the Tsunami Programme. It also urged the Finance Commission to set up a subcommittee on audit and risk management, which could report directly to the Governing Board and the President of the Federation in certain circumstances.

On 10 May 2007 the Secretary General wrote to the complainant, expressing his surprise at the distribution of internal documents to members of the Governing Board. He requested that the complainant send him a copy of the correspondence he might have had with members of the Governing Board or representatives of National Societies. The complainant replied on the following day sending the requested correspondence. Having later sought and obtained written explanations from him, the Secretary General convened a meeting on 13 July 2007 during which he handed the complainant a notice of termination of contract. On 15 September 2007 the complainant filed an appeal against that decision with the Joint Appeals Commission. In its report of 9 October 2007, the Commission considered that there were valid grounds for termination based on the “extensive warnings” given to the complainant. However, in view of the circumstances of the case, and particularly the delay in resolving the matter, the Commission recommended, “based purely on [...] procedural issues”, that the parties should seek a “mutually agreed and realistic compensation arrangement”. However, no agreement could be reached regarding the compensation and by letter of 18 December 2007 the complainant was informed that the Secretary General had decided to maintain the decision to terminate his contract. That is the impugned decision.

At its extraordinary session in November 2007 the Governing Board rejected the complainant’s request that it review the decision to terminate his contract and tasked a subcommittee to examine the allegations made in his internal appeal. Having found no evidence in support of the allegations in question, the Governing Board’s subcommittee recommended that the matter be closed.

B. The complainant submits that the decision to terminate his contract is tainted with incomplete and incorrect consideration of facts, as the Secretary General failed to take into account that, according to his post description, the Code of Conduct for all Staff of the Federation Secretariat (hereinafter “the Code of Conduct”) and the Internal Audit Charter, it was his duty to inform, after having exhausted all other channels of communication, selected members of the governing bodies about issues of critical importance, including apparent violations of the latter two texts and the Financial Regulations by the Secretary General and other officials. He points out that on various occasions since 2002, he vainly reported to the Finance Commission and the Secretary General the financial risks to which the Secretariat was exposed and the serious limitations placed on the activities of the Risk Management and Audit Department but that they did not convey those issues to the Governing Board. He was thus obliged to report directly to the governing bodies of the Federation.

He asserts that the Secretary General decided to terminate his contract in order to retaliate against him for insisting on the independence of the audit function, reporting directly to the governing bodies, and revealing the Secretary General’s apparently fraudulent activities. The decision was consequently not taken in the interest of the Federation and it is tainted with abuse of authority and bias. In the complainant’s opinion, the reasons given in the notice of 13 July 2007 were mere pretexts to justify terminating his contract, the real reason being the Secretary General’s resentment at his attempts to report management irregularities to the governing bodies. He considers that the treatment he received was an affront to his dignity and points out that the duty of care that the Federation owed him was even greater as he held an open-ended contract. He submits that, as the Secretary General’s personal interests were involved, it was for the Governing Board to make the termination decision, following an independent investigation.

The complainant asserts that the decision to terminate his contract is tainted with procedural irregularities and amounts to a disguised disciplinary measure. He points out that the reasons given for

terminating his appointment contradict the Secretary General's earlier directives, and that the Federation failed to hear him and to investigate his alleged misconduct before the decision was taken as required by the Code of Conduct.

He avers that the Federation did not discharge its duty to protect him from retaliation and that the Joint Appeals Commission breached his due process rights by failing to investigate the Secretary General's abuse of authority and retaliation. He alleges a further breach of due process in that the Federation failed to grant him access to relevant documents in spite of his requests. He also complains that his access to the Federation's building, electronic files and to his e-mail was restricted following the termination of his appointment.

The complainant applies for hearings and asks the Tribunal to order the Federation to produce several documents. He seeks the quashing of the decision to terminate his contract and the removal of any document alleging misconduct or shortcomings in his performance from his employment file. He also asks the Tribunal to order payment of his gross salary, allowances and other emoluments from the date of his termination as well as his reinstatement in his former post or, in the alternative, payment of an amount equivalent to his salary, allowances and emoluments until the date when he would have reached retirement age. He claims material and moral damages in the amount of 1 million Swiss francs as well as costs, plus interest on all arrears.

C. In its reply the Federation refers to several provisions of the Constitution, the Financial Regulations and the Internal Audit Charter which clarify, in its view, the role and reporting lines of the Risk Management and Audit Department. It asserts that the decision to terminate the complainant's contract was justified by a fundamental and persistent divergence of views concerning the role of that department and the content and distribution of its reports, and by the deterioration of trust between the complainant on the one hand and the Secretary General and the Finance Commission on the other, particularly as the complainant continued to approach members of the Governing Board directly. Additionally, the complainant refused the

auditor position proposed for 2005, at a time when the activities of his department required increased personnel resources. He thus showed his inability to strengthen the department.

The defendant argues that the impugned decision was taken by the competent authority according to the Constitution, and in line with the procedure laid down in the Staff Regulations and Staff Rules. Relying on the exchanges between the complainant and the Secretary General, the Federation submits that the former was given two warnings and several opportunities to express his views and rectify his behaviour. It notes that the Governing Board rejected the complainant's request to review the decision to terminate his contract and that its subcommittee found no evidence in support of his accusations against the Secretary General.

The Federation contends that the decision to terminate the complainant's contract does not amount to a disciplinary measure as "the case was never about misconduct". It indicates that the complainant was provided with all available documents which did not contain confidential information.

D. In his rejoinder the complainant challenges the relevance and interpretation of the provisions cited by the Federation regarding the role and reporting lines of the Risk Management and Audit Department. He rejects the defendant's account of events and elaborates on his pleas. He rebuts the Federation's contention that his case is not about misconduct noting that, in his letter of 13 April 2006, the Secretary General made explicit allegations of misconduct. In addition, he explains that he had no choice but to turn down the Secretary General's proposal for a temporary auditor position, as it created a conflict of interest. He points out that he was not questioned by the Governing Board's subcommittee in the course of its investigation and he asks to be provided with a copy of its report. He also asks the Tribunal to order that the Federation disclose several other documents which he says are relevant to his case.

E. In its surrejoinder the Federation maintains its position. It denies that the decision to terminate the complainant's contract was taken by

way of retaliation and stresses that the complainant was neither the subject nor the instigator of the investigation of the Governing Board's subcommittee. It affirms that the Secretary General's letters of 13 April and 24 July 2006 did not constitute disciplinary measures but warnings of unsatisfactory performance: the former letter drew the complainant's attention to potential misconduct and the latter confirmed that no disciplinary or administrative step would be taken. The Federation contends that it had no obligation to hear the complainant as he had had ample opportunity to present his arguments in writing. It appends to its surrejoinder some of the documents requested in the rejoinder. It submits that the complainant's claims are disproportionate in view of the fact that he now receives a retirement pension from the Federation.

F. In his additional submissions the complainant questions the defendant's version of some of the events. He maintains that he was not heard in the course of the internal appeal proceedings on the issue of the irregularities he had reported and that the Joint Appeals Commission only had one day to review the lengthy documentary evidence he submitted.

G. In its final observations the Federation contends that the documentary evidence submitted by the complainant to the Joint Appeals Commission largely summarised and quoted documents which he had already produced in June 2007 in support of his internal appeal challenging his performance rating. It adds that the complainant was heard by the Commission in relation to that earlier appeal on 5 July 2007.

CONSIDERATIONS

1. By letter of 13 July 2007 the Secretary General of the Federation terminated the employment of the complainant as Head of the Federation's Risk Management and Audit Department. The Secretary General referred in his letter to their "fundamental disagreement" as to the role of the internal audit function and to

a number of incidents in which, he said, the complainant had disregarded his instructions. He stated that the “failure of trust between [them was] irreparable” and that, although the complainant’s actions might constitute valid grounds for termination with immediate effect, he was terminating his employment in the interest of the Federation in accordance with Article 11.4 of the Staff Regulations. That article allows for termination at will with appropriate notice which, in the present case, was five months. The Secretary General said that the notice period would run from the end of July but stated that the complainant would not be required to work during that period and requested that he not report to the office. He added that the complainant would not have access to electronic files and e-mail but that he would be allowed access to the building to collect his personal belongings.

2. The complainant initiated an internal appeal which was considered by the Joint Appeals Commission in conjunction with his appeal relating to his 2005 performance rating which is the subject of Judgment 2853. The Commission concluded that there was “a professional difference of opinion (technical) over the audit function” on which it was not qualified to render judgement. However, it was of the view that valid grounds for termination existed as early as April 2006 and expressed its perplexity as to the Secretary General’s allowing so much time to elapse before taking “definitive action on 13 July 2007”. The Commission came to the conclusion that there were mitigating factors in that the Secretary General had not acted in a timely manner and that, because of these “procedural issues”, the complainant’s compensation claim had merit. In the result, it recommended that there be “a mutually agreed and realistic compensation arrangement”. An agreement proved impossible to reach and, by letter of 18 December 2007, the Secretary General informed the complainant that he had decided to maintain his decision of 13 July 2007. That is the decision impugned before the Tribunal.

3. The complainant contends that the decision to terminate his employment was an abuse of authority, was taken in retaliation for his

having informed certain members of the governing bodies of his concerns that the Secretary General and the Finance Commission had violated the Federation's Code of Conduct, was the result of bias and malice on the part of the Secretary General, involved procedural irregularities and was a disguised disciplinary measure. He also contends that he was denied due process and that the Secretary General should have recused himself from the final decision-making process. He further argues that the terms of the letter of 13 July 2007 were a gross affront to his dignity. He asks that the impugned decision be quashed and that he be reinstated as the Head of the Risk Management and Audit Department. In the alternative, he asks for compensation equivalent to the gross salary he would have received in that position until the date on which he would have reached retirement age. He also seeks material and moral damages as well as costs. Additionally, he asks for an oral hearing and for an order for the production of documents. The complainant has already been supplied with various documents and he points to nothing to suggest that the documents he now seeks are relevant to his claims. Further, in view of the extensive nature of the pleadings and the exhibits, there is no need for oral hearings. Accordingly, the complainant's two procedural applications are rejected.

4. It is clear, as the Secretary General stated in his letter of 13 July 2007, that there were fundamental disagreements between himself and the complainant as to the role of the Head of the Risk Management and Audit Department. The complainant's job description specified that he was responsible for helping the Federation "within the terms established in the Charter of the Department, and in conformity with the auditor's operational standards and rules of professional conduct". Paragraph 1 of the Federation's Internal Audit Charter relevantly provided at the material time that the Risk Management and Audit Department:

"assist[ed] the Secretary General and the governing bodies of the Federation by furnishing them with periodic, independent and objective appraisals and audits of all Federation sources and use of resources, human and financial."

Paragraph 2 of the Charter specified that the above department “reports to the Secretary General, as an independent function of the Secretariat, and has right of access to the Finance Commission” (emphasis added). Paragraph 3 of the Charter identified the scope of the department’s activities as “Audit of Secretariat and Field Operations”, “Co-ordination of External Audits” and “Support and Advisory Roles”. The latter included:

“Providing support to the Finance Commission and other governing bodies, through the Secretary General, as need ar[ose].”

5. Although the complainant contends otherwise, the words “and in conformity with the auditor’s operational standards and rules of professional conduct” in his job description did not authorise him to act beyond the authority expressly conferred by the Internal Audit Charter. Rather, they conditioned those activities by requiring that they be performed in conformity with those standards and rules. Similarly, the words “through the Secretary General” in the Charter related only to the provision of support to the Finance Commission and other governing bodies and did not restrict the complainant’s right of “access to the Finance Commission” in relation to periodic appraisals and audits.

6. From the time of his appointment in January 2002 the complainant submitted periodic reports to the Finance Commission. In his September 2004 report he identified “project deficits” as a recurring risk and recommended that expenditure authorisations be based on actual contributions and not on expected funding. The Finance Commission considered the report but this aspect was not referred to the Governing Board. Later, in November of that year, the number of internal auditors in the Risk Management and Audit Department was reduced from two to one. The complainant reported to both the Secretary General and the Finance Commission that the reduction in staff was placing limitations on the internal audit function. In September 2005 the complainant requested that the Secretary General submit his report dealing with that issue to the Governing Board. The report also dealt with new accounting

policies which, in the complainant's view, were neither adequate nor compliant with the Federation's Financial Regulations. On 28 September the Secretary General informed the complainant that he would not refer his report to the Governing Board. In so doing, he indicated that he had consulted the Chairman of the Finance Commission, who was *ex officio* a member of the Governing Board, and that he had confirmed that the Commission had not considered it appropriate to raise the matter with the Board. The Secretary General also stated:

"I am of the view that the continuation of [...] the practice [...] by your accessing directly the Finance Commission and, of course, your contacts with the external auditors and your reports to the senior management provide sufficient channels for relevant information to reach the governance. I have no information to believe that there are reasons to go beyond the current practice and support the internal auditor's routine access to the Board."

7. Questions arose in early 2006 as to the provision to donors of an external audit report concerning one of the National Societies and, again, with respect to the Head of Risk Management and Audit Department's access to governance. On 3 March 2006 the Secretary General issued a Note on the Distribution of Audit and Investigation Reports limiting distribution of audit reports to donors. Distribution was restricted to revenue and expenditure statements and then only to requesting donors. Other audit reports were limited to the Secretariat unless otherwise authorised by the Secretary General. By a memorandum dated 7 March 2006 accompanying the Note, the Secretary General informed the complainant that it was his conviction that the "internal audit function [...] should only have access to governance through the Finance Commission". Additionally, he stated:

"The [audit] report should summarise implementation of audit recommendations which have been accepted by management, as well as give feedback on key audit issues arising in the period since the last meeting [with the Finance Commission]. Where the report presents the views of the Risk Management and Internal Audit Department alongside any such feedback, it must also fully present the responses of management in order to produce a balanced perspective of the issue. The report should therefore be approved by me before it is submitted to the Commission.

This also applies to any other audit materials to be transmitted to the Commission, either at your initiative or requested by the Finance Commission.”

8. On 24 March 2006 the complainant and the Secretary General discussed the distribution of the forthcoming report of his department to the Finance Commission. The report raised questions as to limitations placed on the activities of the department and on the distribution of audit reports. It also raised the requirement for reports and all other audit material to be approved by the Secretary General before submission to the Finance Commission. On 27 March 2006 the complainant sent his report directly to members of the Finance Commission. He also informed the President of the Federation of its content.

9. The question of distribution of internal audit reports was raised by the Secretary General with the Finance Commission at its April 2006 meeting. On 11 April the Chairman of the Commission wrote to the Secretary General expressing the Commission’s agreement with his position and added that the Commission:

“therefore encourage[d him] to revisit the internal audit charter and its practical application and to take such steps necessary to minimize the risks which could result from the conduct of work by the internal audit department”.

A revised Internal Audit Charter with accompanying notes was drafted in October 2006.

10. The Secretary General wrote to the complainant on 13 April 2006 stating that he considered that his distribution of the April report to the members of the Finance Commission on 27 March was a breach of the Code of Conduct warranting a written warning. He gave the complainant ten days within which to explain his behaviour. The complainant responded on 28 April 2006, disputing aspects of the Secretary General’s version of their discussion on 24 March and asserting that the Secretary General had asked him to wait until 27 March before circulating the report and had not expressly stated that he, the Secretary General, would distribute the report. In the end, no

written warning was issued and the complainant was informed by letter of 24 July 2006 that no “disciplinary or administrative steps” would be taken. The Finance Commission did not refer the concerns raised by the complainant in his report to the Governing Board.

11. The complainant again raised the question of “project deficits” in an e-mail sent to the President of the Federation in July 2006, then in the report he submitted to the Finance Commission in September 2006. At its meeting, the Commission noted that “Secretariat Management should place particular focus on the improved management of project deficits” but, apparently, did not refer the complainant’s report to the Governing Board. In the meantime, the Finance Commission had, in its report to the Governing Board, recommended against a proposal to create a separate audit and risk management body. On 15 October 2006 the complainant wrote to the President of the Federation expressing his disagreement with that recommendation and suggesting that “summary [i]nternal [a]udit reports [...] be transmitted through the Secretary General to a specialised [a]udit [c]ommittee for consideration”. The next day the President requested a translation of his comments so that they could be provided to the Federation’s Constitutional Review Working Group and, in due course, a translation was provided. The proposal to create a separate audit and risk management committee was approved in principle at the Governing Board’s meeting in October.

12. As already noted, the Internal Audit Charter was revised in October 2006. The Secretary General provided a draft revised and annotated Internal Audit Charter to the complainant and requested his comments before putting it into effect. It is not clear whether and, if so, when the revised Charter came into effect but the evidence is that it had not been brought into effect when the complainant was informed of the termination of his contract in July 2007. The revised Charter provided that reports to the Finance Commission were to go through its Secretary, the Director of the Support Services Division, and allowed that, at its discretion, the Commission could discuss reports with the Head of the Risk Management and Audit Department, including in *in*

camera sessions. The complainant provided his comments on 20 November 2007, criticising aspects of the revision. On the same day he sent an e-mail to the President of the Federation objecting to aspects of the proposed revision and requesting that that and future amendments to the Charter be submitted to the Governing Board for its approval.

13. Earlier in 2006, the Secretary General had requested an external firm to perform an audit and report on procedures and control activities in relation to the Federation's Tsunami Programme. The complainant was provided with a copy of the report in March 2007. He expressed the view that the report was incorrect and inaccurate insofar as it concerned risk management and, on 19 March 2007, he requested the Secretary General to obtain an amended report and to circulate it to all recipients of the original report. On the same day the complainant sent an e-mail to the President of the Federation with respect to the Tsunami Programme funding gap.

14. In its April 2007 report, the Finance Commission noted that differences of opinion existed between the complainant on the one hand, and, on the other, the external firm and the Secretary General. It recommended that the Secretary General take "concrete steps to improve the effectiveness of the risk management and audit function". In May 2007 the Governing Board endorsed that recommendation and also recommended the establishment of a subcommittee on audit and risk management. Apparently, it was at that meeting that the Secretary General learned that some "internal audit papers [were] circulating among Governing Board members". On 10 May 2007 he asked the complainant to provide him with a copy of the correspondence between him and members of the Governing Board and representatives of National Societies within the last two months. That was provided and, on 25 May, the Secretary General wrote to the complainant asking for an explanation by 18 June for his conduct in corresponding directly with "the President, members of the Governing Board and staff of a [N]ational [S]ociety member of the Board – especially sharing sensitive internal documents in their draft form and seeking to influence decisions of the Board". The written explanation was sought

“[i]n view of the seriousness of th[e] matter and the potential consequences it [might] entail”.

15. In his response to the Secretary General, the complainant stated that he had shared the “proposed revision of the Internal Audit Charter” because the proposal removed the governing bodies of the Federation “from the list of usual clients of the [Federation’s] Internal Auditing Services”. So far as concerns the “formation of an [a]udit and [r]isk [m]anagement [c]ommittee”, the complainant stated that he considered it was his duty to advise the members of the Board on risk and audit matters and to assist them in making an informed decision on the formation of the committee and its constitutional implications. It was in this context that the Secretary General terminated the complainant’s appointment.

As already indicated, the Secretary General pointed out their fundamental disagreement as to the role of the internal audit function and to the complainant’s disregard of his instructions. Additionally, he referred to his letter of 24 July 2006 in which he had informed the complainant that no “disciplinary or administrative steps” would be taken against him in consequence of his having distributed the Internal Audit Report to the Finance Commission on 27 March 2006. In that letter the Secretary General had also stated that, in his view, the allegation of misconduct had been substantiated and warned the complainant that, if he did not work in accordance with his, the Secretary General’s, formulation of the principles relating to the role of the Head of the Risk Management and Audit Department, he would “have no choice but to terminate [his] contract in the interests of the Federation”. He referred to that warning in the letter terminating the complainant’s contract.

16. Before turning to the grounds on which the complainant challenges the Secretary General’s decision to terminate his employment, it is convenient to note that the history of events leading to that decision clearly indicates that its immediate cause was the complainant’s communications with the President of the Federation and members of the Governing Board with respect to the formation of

an audit and risk management committee. As already indicated, that course of action was approved in principle by the Board in October 2006 and confirmed in May 2007; it had been advocated by the complainant since October 2006 but was contrary to the recommendation of the Finance Commission. There was nothing in the complainant's job description or in the Internal Audit Charter authorising his communications with the President and members of the Governing Board with respect to that matter.

17. The fact that the immediate cause of the Secretary General's decision to terminate the complainant's contract was his unauthorised communications with the President and members of the Governing Board militates against acceptance of his argument that the decision to terminate his employment constituted "retaliation for having blown the whistle". Similarly, it militates against acceptance of his argument that the decision was "retaliation for [his] having disclosed [...] concerns about violations of the [Federation's] Code of Conduct" and "about serious limitations placed on the [i]nternal [a]uditing activities and resources by the Secretary General in conflict with the best interests of the Federation" and that it was "taken in an effort to disguise his [the Secretary General's] own alleged wrongdoing". In regard to these matters, it is sufficient to note that there is no evidence that the Secretary General did not obtain appropriate authorisation from the Governing Board before authorising unbudgeted expenditure or "project deficits". Nor is there any evidence of wrongdoing on the part of the Finance Commission: certainly, it was not obliged to forward the complainant's reports to the Governing Board. Further, the Secretary General did not attempt to delete the complainant's opinions with respect to "project deficits" or the resources available to his department from his reports to the Finance Commission or, in any other way, attempt to censor or modify his remarks. Nor did he attempt to limit the complainant's contacts with the external auditors. In these circumstances, the complainant's arguments based on abuse of authority and/or retaliation must be rejected.

18. In Judgment 2090 the Tribunal explained that the provisions of the Federation's Staff Regulations dealing with termination do not authorise the arbitrary termination of contracts and added, under 5, that "there must be no breach of adversarial procedure [...] nor abuse of authority, nor obvious misappraisal of the facts". The same applies to Article 11.4 of the Staff Regulations which deals with termination at will. Further, a decision taken pursuant to the latter must be taken in the interests of the Federation. Thus, a decision purportedly taken under Article 11.4 of the Staff Regulations in the interests of the Federation will be set aside if it constitutes a disguised disciplinary measure. A decision of that kind is not taken in the interest of the Federation but for the purpose of avoiding the procedural requirements that must be observed in the case of disciplinary measures.

19. The Tribunal identified a hidden sanction in Judgment 2659 as "a measure which appears to be adopted in the interests of the Organization and in accordance with the applicable rules, but which in reality is a disciplinary measure imposed as a penalty for a transgression, whether real or imaginary". The Tribunal also pointed out in that judgment that "[t]he true disciplinary nature of an administrative measure that constitutes a hidden sanction is not always apparent" and that, accordingly, it is "necessary to examine the particular circumstances in each case".

20. There are a number of matters in the present case that indicate that the decision to terminate the complainant's contract was a disciplinary measure. In this regard, the complainant was requested not to report to his office, his access to electronic files and to e-mail was terminated and he was allowed access to the Federation's building only to collect his personal belongings. Further, the letter of termination of 13 July 2007 referred to the complainant's refusal to accept the Secretary General's instructions and said that his "defiance of [the Secretary General's] instructions [might] constitute grounds for termination for valid reasons with immediate effect". The Secretary General had already stated in July 2006 that he considered

the complainant had been guilty of misconduct in distributing his report to the Finance Commission on 27 March 2006 contrary to his instructions and had then warned him of the consequences of non-compliance with his formulation of principles regarding the role of the internal audit function. Additionally, the Secretary General's letter requesting an explanation for communicating with the President of the Federation and members of the Governing Board referred to the "seriousness of [the] matter and the potential consequences it [might] entail". There can be no doubt that the Secretary General was of the view that the complainant's unauthorised communications with the President and members of the Governing Board constituted misconduct. In these circumstances, the proper conclusion is that the complainant's termination constituted a hidden disciplinary sanction. The Joint Appeals Commission erred in not so finding. Accordingly, and because the Secretary General did not consider this issue when rejecting the complainant's internal appeal, that decision must be set aside.

21. Although the decision to terminate the complainant's contract was a disguised disciplinary measure, there is no evidence to justify a conclusion that it was the result of bias or malice on the part of the Secretary General or that it was in any way discriminatory. There was a serious disagreement between him and the complainant as to the role of the internal audit function – an issue about which they were both in the wrong. The Secretary General was wrong in requiring, in March 2006, that he approve audit reports and other audit material before transmission to the Finance Commission. That was inconsistent with the right of access of the Risk Management and Audit Department to the Commission, as provided in the Internal Audit Charter. The complainant was wrong in thinking that he had either a right or a duty to communicate with the President of the Federation and members of the Governing Board, whether by reason of the restrictions placed on his access to the Finance Commission, the reference in his job description to "operational standards and rules of professional conduct" or both. However, the fact that the Secretary General was wrong in requiring the complainant to obtain his approval

before submitting reports and other material to the Finance Commission falls far short of establishing malice, ill will, discrimination or bias.

22. It is unnecessary to consider the other arguments of the complainant as they would justify no greater relief than is warranted by the finding that the decision to terminate his contract was a hidden disciplinary measure.

23. Given the complainant's unauthorised communications with the President of the Federation and members of the Governing Board, reinstatement is not an appropriate remedy. In a case such as the present one where termination constitutes a hidden disciplinary sanction and reinstatement is not appropriate, compensation should be assessed on the basis of what would have occurred if proper procedures had been followed. In this regard, it is not necessary to consider the possibility of immediate termination for valid reasons, that course apparently having been rejected by the Secretary General. However, Article 11.2.1 of the Staff Regulations allows for termination with notice if a staff member does not maintain satisfactory relations with the Secretary General. That course can only be taken "after a formal written warning allowing three (3) months for improvement". Given the unsatisfactory state of relations that had developed between the complainant and the Secretary General, it is highly unlikely that a written warning would have resulted in satisfactory relations. Even so, if proper procedures had been observed, the complainant would have been retained in employment for the duration of the warning and notice periods, amounting, in all, to approximately nine months, depending upon when the warning was given. Given that the complainant has had the benefit of five months' notice, it is appropriate that compensation be awarded in an amount equivalent to the gross salary, allowances and emoluments he would have received for the period of four months following the expiry of the notice period specified in the letter of termination of 13 July 2007.

24. Having regard to the Secretary General's having wrongfully restricted the complainant's access to the Finance Commission – a

matter that undoubtedly contributed significantly to the breakdown of their relations – and to the fact that the termination of his employment was a disguised disciplinary measure that resulted in the denial of procedural safeguards, the complainant is entitled to moral damages in the amount of 20,000 Swiss francs. He is also entitled to an award of costs.

DECISION

For the above reasons,

1. The Secretary General's decision of 18 December 2007 is set aside.
2. The Federation shall pay the complainant compensation in an amount equivalent to four months' gross salary, allowances and other emoluments in accordance with consideration 23.
3. It shall also pay him moral damages in the amount of 20,000 Swiss francs and costs in the amount of 5,000 francs.
4. 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