

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K.

v.

**International Federation of Red Cross
and Red Crescent Societies**

122nd Session

Judgment No. 3677

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms V. K. against the International Federation of Red Cross and Red Crescent Societies (hereinafter “the Federation”) on 11 December 2013 and corrected on 28 February 2014, the Federation’s reply of 1 July, the complainant’s rejoinder of 22 September and the Federation’s surrejoinder of 23 December 2014;

Considering Articles II, paragraph 5, and VII 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 contests the Federation’s decisions to abolish her post and not to renew her fixed-term contract.

The complainant joined the Federation in September 2008 as a Senior Officer, Gender, in the Principles & Values (P&V) Department. Her initial one-year fixed-term contract was subsequently renewed until 16 March 2011. From March 2010 until February 2011 she also served as Acting Head of the P&V Department.

By a letter of 11 March 2011 the Human Resources Department (HRD) notified the complainant of the non-renewal of her fixed-term

contract and informed her that in lieu of the three months' notice required under the applicable rules, her contract would be extended until 30 June 2011. The letter also informed her that, as recent changes in the Federation had shifted the focus to the theme of peace and non-violence, it was no longer justified to have a post fully dedicated to gender and therefore her post would be abolished upon the expiry of her contract. Following her separation, the complainant returned to the World Food Programme (WFP), which had granted her leave without pay to enable her to work for the Federation.

On 8 July 2011 the complainant wrote to HRD alleging that the abolition of her position was illusory and tainted by prejudice and malice, and that her line manager had subjected her to harassment. She requested that a formal grievance procedure under Annex 2 to the Staff Regulations be initiated to address these allegations. On 2 August 2011 she received an e-mail from HRD indicating that her allegations regarding the abolition of her post would be reviewed in terms of the non-renewal of her contract and that the allegations regarding breaches of the Code of Conduct would be handled as per the Federation's disciplinary procedures. On 28 October 2011 she filed an internal appeal against the decisions not to renew her contract and to abolish her post, claiming compensation for the Federation's failure to treat her with dignity and respect as well as damages. Following an administrative review of the allegations she had made on 8 July, including an assessment by HRD of a possible breach of the Code of Conduct, the Head of HRD informed the complainant by an e-mail of 7 March 2012 that there was no evidence that she had been subjected to harassment or that the decisions to abolish her post and not to renew her contract were based on retaliation.

The ad hoc Joint Appeals Commission (JAC) that was established in January 2013 to review the complainant's appeal held hearings in April 2013 and delivered its recommendations in August 2013. It considered that the complainant had not reported a possible Code of Conduct violation and it therefore refrained from examining her allegation that she had suffered an affront to her dignity on the ground that it fell outside its mandate. As regards the decision not to renew the complainant's contract, the JAC considered that it was properly

justified and implemented according to the rules. It recommended that no further action be taken and that the case be closed. By a letter of 11 September 2013, the Secretary General notified the complainant that, whilst he did not endorse the JAC's reasoning in its entirety, he had decided to follow its recommendations. He specified that, although she had not filed a Code of Conduct complaint, HRD had assessed the matter as a possible Code of Conduct violation but had not found any element to substantiate such a violation. That is the impugned decision.

The complainant requests that her former post with the Federation be immediately restored, that she be reinstated in that post with retroactive effect and that she be paid all the salary, step increases, benefits, pension contributions and other emoluments that she would have received in that post since 30 June 2011. She also seeks interest on these amounts. In the event that the Tribunal does not order her reinstatement, she claims compensation in an amount equal to two years of the gross salary, step increases, benefits, pension contributions and all other emoluments (at the most recent pay scale) that she would have received if her post had not been irregularly abolished and her contract terminated. She claims 150,000 Swiss francs in moral damages, additional moral and exemplary damages for the egregious two-year delay in the internal appeal process and interest on all amounts awarded at the rate of 5 per cent per annum from 30 June 2011 until the date that the Tribunal's judgment is fully executed. She also claims all legal fees incurred in bringing this complaint and such other relief as the Tribunal may deem just, equitable and proper. She asks that the Federation be ordered to produce a large number of documents relevant to her case.

The Federation submits that the complainant's request for the production of documents is not warranted and asks the Tribunal to dismiss the complaint.

CONSIDERATIONS

1. The complainant commenced working with the Federation on 17 September 2008 on a one-year contract. To do so she took leave without pay from the WFP. Her position with the Federation was as a Senior

Officer, Gender, in the P&V Department. In August 2009 her contract was extended for a further 18 months and was due to conclude on 16 March 2011. The head of the P&V Department, Ms K.B., went on maternity leave in mid-2010 and the complainant acted in that position until Ms K.B. returned in February 2011. On 11 March 2011 the complainant was given a letter informing her that her current contract would be extended until 30 June 2011 but would then come to an end. The central reason given was that recent changes in the Federation had impacted on the focus of the P&V Department and it had been decided that a position fully dedicated to gender was no longer justified and her post of Senior Officer, Gender, would be “cut” upon the expiry of her contract.

2. The complainant challenged the non-renewal of her contract and the termination of her employment and ultimately did so by way of internal appeal to the JAC. On 9 August 2013 the JAC issued its report and recommendations, recommending that no further action be taken and that the matter be closed. This led to a decision of the Secretary General of 11 September 2013 upholding the decision not to renew the complainant’s fixed-term contract.

3. It is convenient to deal with the issues raised by the complainant by reference to the grounds of appeal in her brief and to deal with the facts relevant to each of these grounds, though acknowledging that much of the factual background is relevant to several grounds and there is some overlap between issues.

4. The first ground was that “the decision not to renew the complainant’s contract was based on and tainted by incomplete and irrelevant facts and erroneous conclusions”. In its reply, the Federation addressed this ground together with the fourth ground. That ground was that the “reasons given for cutting/abolishing the complainant’s post were illusory and irregular”. The Tribunal considers this an appropriate approach given that there is substantial overlap between these two grounds.

5. The reasons advanced by the Federation for the non-renewal of the complainant's contract were, in essence, those below. One of the corporate goals or objectives of the Federation involved giving effect to a strategy embodied in a document entitled "Promoting a culture of non-violence and peace" as part of a threefold strategy embodied in what is described as Strategy 2020. The purpose of the complainant's position when she took up the job in 2008, as reflected in the job description at the time, was focused on giving effect to Strategy 2010. In the result, a decision was taken to no longer have a position focused simply on gender but rather a position dedicated to promoting a culture of non-violence and peace as well as gender issues. This was part of a broader organisational restructuring in the Federation.

6. The complainant argues that, in fact, it was necessary to continue to have a full-time position of the same character as the position she occupied and this was manifested by the continued employment by the Federation of a consultant who continued to do work the complainant had also been doing and, additionally, the fact that the Federation filled a position after her departure which mirrored her post. The substance of the fourth ground is allied to this argument in that the ostensible and erroneous reason was not the real reason.

7. In her complaint, the complainant included a series of e-mail chains involving correspondence between her and others in the Federation during December 2010 and early 2011 about her position in the Federation. Much of the dialogue was with Ms G.A., who was the Under-Secretary General, Humanitarian Values and Diplomacy (USG/HVD) in the latter part of 2010 and the complainant's direct supervisor while acting as head of the P&V Department when Ms K.B. was on maternity leave. It is not in issue that, by this time, the relationship between the complainant and Ms K.B. was, at least from the complainant's perspective, not good and this was so before Ms K.B. went on maternity leave.

8. It is tolerably clear from this e-mail correspondence with Ms G.A. that before the complainant took steps to extend her leave without pay from the WFP, she needed to see changes in the environment

in which she worked. She was seeking Ms G.A.'s approval or even perhaps agreement to increase the staffing in "the gender unit" and create it as a unit or department "directly reporting to [Ms G.A.]". That is to say, the complainant wanted to create an administrative unit in which she would have worked and which she would have presumably lead, with her reporting directly to USG/HVD. The result would have been that the complainant was no longer in a line of command in which she was supervised by Ms K.B. It is not clear what motivated the complainant to seek these changes. It could have been personal ambition, a desire to remove herself from the supervision of Ms K.B. or a desire to create a more efficient and effective administrative structure. It could have been a combination of these factors. However what is important is that the complainant was not committing to continuing to work at the Federation without those changes being made.

9. Indeed, that this was her attitude is evident from an e-mail letter sent by the complainant to other staff within the Federation on 14 March 2011 shortly after she received the letter of 11 March 2011 informing her that her contract would be extended to 30 June 2011 but would then come to an end. The complainant said in the e-mail letter, after referring to what was plainly her perception of the communication style and "high concentration on the negatives (often unfairly)" and lack of appreciation on the part of Ms K.B.:

"Based on this, I had in fact already determined to not extend my contract under her management and to rather opt to return to the World Food Programme, where I am an indefinite appointment holder. However, I would have been open to complete the work we had successfully started with the assistance of so many colleagues within [the Federation] and National Societies, but ONLY if this work could be continued and completed in a more respectful and supportive work environment."

These remarks are consistent with an e-mail the complainant sent to an individual within the Federation, Ms S.D., on 29 July 2011 in relation to the preparation of an attestation of work for the complainant. In that e-mail the complainant said: "I had already applied for return to WPF in December 2010, as I was on [leave without pay]".

10. In an earlier e-mail exchange on 27 January 2011 between the complainant and Ms G.A., the complainant was pursuing Ms G.A. about administrative arrangements and the “positioning of gender within [the Federation]”. Ms G.A. explained to the complainant that it was necessary to develop a strategy and an implementation plan as a first step and that it was necessary to get Ms K.B.’s input, indeed, from Ms G.A.’s perspective, for Ms K.B. to initiate the process (in one of these e-mails it was noted that Ms K.B. would be returning to work “next week”). However Ms G.A. advanced tentatively in an e-mail to the complainant a thought that “PV should be an incubator and launch an idea and then hand it over to Programme to mainstream”. This led to an e-mail response from the complainant that: “Further agree, that gender (as maybe also violence) should move over to Programme to be mainstreamed”. This observation is entirely consistent with the Federation’s argument in its reply that as a result of the need to implement Strategy 2020, the P&V Department would shift from Programme Services to HVD and “focus its energy on the theme of peace and violence, including non-discrimination and respect for diversity, violence prevention, mitigation, and response, and social inclusion: inter-cultural, inter-religious and inter-generational dialogue”. In addition, the P&V Department under HVD had a mandate of advocacy, communications and programming and less on mainstreaming and operations which would be tasks for Programme Services.

11. The Tribunal does not accept the argument of the complainant that after she left a position was created which “mirrored the [c]omplainant’s post”. As the JAC concluded, there were more differences than similarities.

12. Another erroneous fact which the complainant appears to suggest fundamentally tainted the decision not to renew her contract, was the belief of the JAC that the complainant had not filed a Code of Conduct claim or complaint concerning malicious, prejudiced conduct against her, manifesting ill will and personal bias and this error of fact also influenced the Secretary General in making the impugned decision of 11 September 2013. However if, in these proceedings, the complainant

does not make good her allegations of conduct against her of this character and also does not establish that the reason for the non-renewal of the contract was false, then this alleged mistake is of no material consequence.

13. The complainant contends that the JAC's finding or approach about the potential influence of Ms K.B. in the decision not to renew her contract was wrong. The complainant points to the fact that the JAC appears to suggest that because Ms K.B. was on maternity leave when the decision not to renew the contract was made, she could not have influenced that decision. However what the JAC said was not as contended by the complainant but rather was that the decision that there should be a restructuring was beyond the authority of Ms K.B., as the authority for such a decision resided with "the Senior Management Team" with the consequence that "it [was] unlikely that [Ms K.B.] had influenced or triggered this reorganisation". These observations are unexceptionable.

14. The complainant also relies on what is said to be an erroneous conclusion of the Secretary General about the legal test or standard to be applied when deciding not to renew a fixed-term contract in the impugned letter of 11 September 2013. However the remarks of the Secretary General were directed to what he perceived to be, correctly, the JAC erroneously focusing on the grounds of "At Will Termination" in accordance with Articles 11.1.1(c) and 11.4 in Chapter 11, "End of Employment", of the Staff Regulations, when the grounds for the non-renewal of the complainant's contract was "Expiration of a Primary Contract" under Article 11.1.1(i) of the Staff Regulations. The Secretary General's statement that the standard for the termination "At Will" of contracts was stricter than for the termination upon expiry of a fixed-term contract was correct but only in the sense that, as the Secretary General observed, the Staff Regulations themselves provided that, in relation to "At Will Termination" contracts with a maximum term "normally come to an end latest on the date stated therein" whereas, in fact, fixed-term engagements come to an end automatically on completion of the agreed period of service in accordance with Rule 11.4

of the Staff Rules. The Secretary General's observation should not be taken, as the complainant contends, to be a rejection of the Tribunal's jurisprudence concerning the rights of staff on fixed-term contracts upon the expiry of the contracts.

15. For the preceding reasons the first and fourth grounds should be rejected.

16. The second ground was that the Federation should be estopped from terminating the complainant's employment as she was verbally promised by the USG/HVD that her contract would be renewed for a minimum of one year. The complainant relies on a conversation with the USG/HVD, Ms G.A., in December 2010. Ms G.A. disputed that such a promise had been made in the proceedings before the JAC and the JAC said that it found no evidence from which "it [could] be established that Ms G.A. promised to [the complainant] the extension of her contract". However even if the complainant's allegation of fact is true, it ultimately leads nowhere. In a recent judgment, Judgment 3619, considerations 13 and 14, the Tribunal addressed a similar argument raised by a complainant and said:

"13. [...] It is not every statement made by or on behalf of an organisation that is capable of being characterised as a promise that gives rise to a legal obligation on the part of the organisation to honour the promise. Were that the applicable principle, it would almost certainly introduce an unacceptably high level of caution and constraint into the dialogue between senior officers of an organisation and staff members they manage. Open and frank discussion within an organisation is often a desirable part of good management and it can contribute to a positive culture of inclusiveness.

14. It is necessary to refer to the various elements of a promise that give rise to a legal liability to honour the promise. [...] The first element is that there must be a promise to act or not act or to allow. The second element is that the promise must come from someone who is competent or deemed competent to make it. The third element is that the breach of the promise would cause injury to the person who relies on it. The fourth was that the position in law should not have altered between the date of the promise and the date on which fulfilment is due. The third element has two sub-elements. One is that the promisee has relied on the promise and the second is that this reliance has caused injury to the promisee in the event of non-fulfilment of the promise."

There is nothing to suggest that the complainant relied on the promise, if it was a promise, arising from the conversation with Ms G.A. She simply continued to do what she had been engaged to do, namely work under the contract she entered in September 2008 including, at the time, acting in the position as head of the P&V Department. Nor did she suffer injury of the type to which the principle is directed. The second ground should therefore be rejected.

17. The third ground was that “the non-renewal of the complainant’s contract was based on the malice, ill-will, prejudice and personal bias of Federation officials”. Again, in its reply, the Federation addressed this ground together with another ground, namely the fifth ground. It was that the “treatment of the complainant by her supervisor, as ratified by the Federation, was an affront to the dignity and respect to which the complainant was entitled to as an international civil servant”. The Tribunal again considers this to be an appropriate approach given that there is substantial overlap between these two grounds.

18. As already noted, there is no issue that the relationship between the complainant and Ms K.B. was not a good one. However the critical issue is whether the complainant has discharged the onus of establishing that the decision not to renew her contract and, perhaps additionally, the decision to create the new position, was tainted in the way suggested. The Tribunal is not satisfied it was. As already discussed, the complainant’s position existed in an environment in which the Federation was pursuing the objectives embodied in Strategy 2010 and the continuation of her position, as then structured and defined, was not compatible with the pursuit of the objectives in Strategy 2020. In the circumstances it was reasonable for the Federation to take the decision not to renew the complainant’s contract.

19. It is to be recalled that the complainant was told of the decision not to renew her contract on 11 March 2011 and that Ms K.B. returned to work in probably the first week of February 2011. The issue is whether there is persuasive evidence that in the period between Ms K.B. returning to work and the decision being made not to renew

the complainant's contract, the working relationship between these two persons was so acrimonious as to enable an inference to be drawn that the decision not to renew was influenced by bias or malice on the part of Ms K.B., notwithstanding changing organisational arrangements which might, in any event, have justified non-renewal.

20. Apart from statements at a high level of generality, the case of the complainant is substantially based on the minutes of a meeting of 11 February 2011 between the complainant and Ms K.B. The minutes were taken by a third party. The minutes show there were differences of opinion between them. However, and in addition, the minutes record that some of the discussion was personalised. The complainant is recorded as saying she did not understand why her professional approach and decisions were being questioned and that she had been a lot more successful than Ms K.B. appeared to acknowledge. Also the complainant is recorded as saying that her guidance and technical advice was not being heard and she felt her work was considered unprofessional. These observations are mainly an account of the complainant's perception. However they fall short of demonstrating that, on Ms K.B.'s part, she had an attitude towards the complainant which, on the balance of probabilities, motivated her to take decisions or influence decisions affecting the complainant which were not rational or fair. The Tribunal rejects the third and fifth grounds advanced by the complainant.

21. The sixth ground concerns the time taken to resolve the internal appeal. In her brief, the complainant contends the Federation took "nearly two years to complete the internal appeal" and this was inexplicably long. In its reply, the Federation took issue with this analysis arguing, in substance, it was too simplistic to say the internal appeal took two years having regard to the need to undertake administrative review of some aspects of the complainant's grievances and also the need to meet the complainant's request that the appeal be heard under the old rules and mechanisms rather than the new ones. This led to the submission by the Federation that the JAC issued its recommendations less than seven months after it had been constituted and that the Secretary General's decision followed a month later. In her rejoinder

the complainant argues that the analysis of the Federation “misses the forest for the trees” and what was important was that it took two years to complete the internal appeal process.

22. In assessing whether moral damages should be awarded for a lengthy delay in disposing of an internal appeal, a number of considerations may be relevant. In some cases it might be sufficient for a complainant only to establish that the internal appeal took a period of time that could reasonably be viewed as too long. In other cases the explanation for the delay will become relevant. In this case the Federation provides an explanation that includes time taken to meet requests of the complainant as to how the internal appeal should be conducted. The Tribunal accepts this explanation and accordingly rejects the claim for moral damages on the grounds of unreasonable delay in the internal appeal process.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 16 May 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, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

ANDREW BUTLER