

NINETY-SECOND SESSION

In re Morcos

Judgment No. 2090

The Administrative Tribunal,

Considering the complaint filed by Mr Magdi Louis Morcos against the International Federation of Red Cross and Red Crescent Societies (hereinafter "the Federation") on 28 December 2000, the Federation's reply of 14 February 2001, the complainant's rejoinder of 23 May and the Federation's surrejoinder of 29 June 2001;

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. The complainant, who has both British and Egyptian nationalities, was born in 1938. Between 1995 and 1998 he served the Asian Development Bank as Controller, in the Philippines. He joined the Federation on 19 October 1998 as Under-Secretary General for Finance and Administration on a fixed-term appointment for five years. At the end of 1999 he applied for the post of Secretary General, but was unsuccessful despite being placed on the short list.

On 8 May 2000 the new Secretary General met with the complainant and the two other Under-Secretaries General and informed them that their posts in their present form were to be abolished in the restructuring of the Secretariat. The complainant's two colleagues would be reassigned as Division Directors, one for Monitoring and Evaluation and the other for Advocacy and Communication. In a letter of 12 May the Secretary General told the complainant that his duties, along with certain other functions, would be transferred to the new post of Director of the Division of Corporate Services (as it later became). Although it was within his power to terminate the complainant's appointment under Article 1010.1 of the Staff Regulations, he deemed it more appropriate to apply Article 1030 and make the complainant's position redundant. Although Article 1030.1 specifies that in the event of redundancy a staff member is to be offered a transfer to another post, if a suitable opening is available, he was not yet in a position to see if there was such an opening in the Secretariat in Geneva. Lastly, he said that the letter constituted notice under Article 1030.3.

As from 15 May 2000 the complainant took sick leave. By a letter of 2 June he informed the Secretary General that the shock of learning that his post was to be abolished had made him temporarily unfit for work. In his submission the notice served in the letter of 12 May was invalid, having reached him on 16 May while he was on sick leave. The Secretary General replied on 15 June that the validity of the notice was being looked into. By a letter of 18 August the Director of the Human Resources Department informed the complainant that his position would be abolished as from 30 September 2000 and that, unless suitable alternative employment was found for him before then, his contract would end on 30 November 2000. In accordance with Article 1030.4 of the Staff Regulations, he would be paid an indemnity in the form of a lump sum equal to two months' base salary.

While the complainant was on sick leave the Federation contemplated transfers for him to Abidjan or Delhi, but neither materialised. On 11 September 2000 the Secretary General had a talk with him during which he told him that he was released from his duties and that he would stop coming to work. He confirmed that in a letter of 12 September.

On 2 October the complainant appealed to the Joint Appeals Commission claiming the quashing of the decision of 18 August and a transfer to the post of Director of Corporate Services. On 29 November he submitted a medical

certificate for the period from 14 November 2000 to 28 February 2001. By a letter of 11 December 2000 the Co-Chairmen of the Commission informed the complainant of the Secretary General's decision to endorse the Commission's recommendation to reject his appeal. That is the impugned decision. In answer to a request for further clarification from the complainant, on 21 December 2000 the Co-Chairmen confirmed that the decision of 11 December 2000 was "final", adding that they were not in a position to provide him with any further documentation about his appeal.

B. The complainant questions the validity of Article 1010.1 of the Staff Regulations under which fixed-term contracts may be terminated by either party "giving one month's notice per each year of service, with a maximum notice of six months". He is surprised, he says, that fixed-term appointments can be terminated in the absence of a just cause or mutual agreement. He points out that he was living in the Philippines when he got the Federation's offer of employment, and would certainly have turned it down had he not been assured of a five-year contract. The fact that his contract referred to the Staff Regulations in his view affords insufficient grounds for putting an end to his appointment before its term.

According to Article 1030.1: "A redundancy can occur due to reduced activities as well as for cases when qualifications to handle the job have changed and a staff member with a different background is required." The complainant alleges that neither contingency applies to his case. The duties that went with his post were not abolished but transferred to another position, so there was no reduction of his activities. As to the duties of the Director of Corporate Services, they differ slightly from those of the Under-Secretary General for Finance and Administration, but fall squarely within the complainant's field of experience. Besides, having been found eligible for the post of Secretary General he was bound to be qualified for the post of Director of Corporate Services. He adds that the person appointed to the latter post appears not to have the relevant qualifications in the field of finance. Moreover, the post was the only one not to be advertised, in breach of Article 210.5 of the Staff Regulations. In his submission the argument that he had become redundant was "pure invention", reflecting the Secretary General's wish to replace him with a younger person.

He alleges that the decision to terminate his services is unlawful. In his view Article 1030.1 says that a staff member whose position becomes redundant must be transferred to another post, as was done in the case of the other two Under-Secretaries General. The complainant has the qualifications for the post of Director of Corporate Services and so should have been transferred to it. It is a general principle of law that the same form and conditions are required to undo as to do an act. The termination of his appointment should therefore have had the approval of the Governing Board, because Article 13(1)(m) of the Federation's Constitution subjects the appointment of Under-Secretaries General to the Board's approval.

He observes that his request for the report of the Joint Appeals Commission has been refused.

As a preliminary claim, he asks the Tribunal to order the production of that report. As substantive claims, he seeks the quashing of the impugned decision, a transfer to the position of Director of Corporate Services as from 1 October 2000 or the payment of his salary, allowances and all benefits to which he would have been entitled under his five-year contract. He also claims moral damages and costs.

C. The Federation replies that the validity of Article 1010.1 of the Staff Regulations cannot be disputed, the meaning of the text being quite plain. The complainant could not have misunderstood, as the conditions of employment which he signed refer expressly to the Regulations, which are quite clear as to the termination of fixed-term appointments. He could not expect a guarantee of employment for five years. Besides, his plea is immaterial because his separation was not based on Article 1010.1.

In the Federation's view the complainant is objecting not to the abolition of his post but to the fact that he was not made Director of Corporate Services. The issue is therefore one of selection, over which the Federation has broad discretion. The latter's approach to restructuring was "professional" and sought to optimise the reorganisation process and to appoint the best candidates to vacant posts. The position of Director of Corporate Services was advertised, so all staff were able to apply for it. The profile of the successful applicant is very different from the complainant's. Being on the short list for the post of Secretary General does not guarantee eligibility for that of Director of Corporate Services; indeed the complainant lacked the necessary qualifications for the latter. The Federation treated him with all due consideration and respect, and had not sought to replace him with a younger person.

Lastly, the Federation points out that the complainant does not claim that there were any suitable posts at headquarters. It did its utmost to transfer him to Abidjan and Delhi, but was unsuccessful. Instead, it has paid him the indemnity prescribed in Article 1030.4 of the Staff Regulations. It adds that the Governing Board must approve the appointment of Under-Secretaries General, but, according to the Staff Rules, need only be informed about the termination of such appointments

The Federation attaches the report of the Joint Appeals Commission to its reply. It applies for hearings of the Secretary General and the complainant. It claims costs.

D. In his rejoinder the complainant contends that the internal appeal procedure was flawed because he was not present when the Secretary General was heard. He was thus denied the chance to prove to the Joint Appeals Committee that he did qualify for the post of Director of Corporate Services. The Federation has not denied that his performance was highly satisfactory. Neither the Commission nor the Secretary General have told him what qualifications he lacks. He therefore concludes that the need to abolish his post has not been proved.

The complainant points out that he signed his contract without having received the Staff Rules. In his submission the term "fixed-term contract" is devoid of meaning if such contracts can be cancelled at short notice. The Federation should have made a point of informing him that the expiry date of his contract was meaningless. He denies that he was treated with all due consideration and respect, pointing out that he was "expulsed" from his office. He adds that there were at least two posts at headquarters to which he could have been transferred.

Lastly, he was on sick leave from 14 November 2000 and according to the Staff Regulations the notice of termination should therefore have been suspended. That would have made the expiry date of his appointment 1 March 2001.

Although ready to appear personally before the Tribunal, he fears that it might serve no useful purpose.

E. In its surrejoinder the Federation denies that the appeal procedure was flawed. It also denies forcing the complainant to leave and asserts that he had received a copy of the Staff Regulations at the latest by the time he signed the copy of his contract in July 1998. His incapacity to work as from 14 November 2000 in no way prolongs his employment relationship: he is confusing the period of his employment with the period during which he was covered by loss of salary insurance, which continued after 30 November 2000. He has received all payments due. The Federation presses its claims.

CONSIDERATIONS

1. The complainant joined the Federation on 19 October 1998 as Under-Secretary General for Finance and Administration on a five-year fixed-term contract. In October 1999 the Federation appointed a new Secretary General, who, in the interests of greater efficiency, proposed a thoroughgoing reform of the Secretariat the essentials of which were approved on 3 May 2000 by the Governing Board. The reform involved abolishing the posts of Under-Secretaries General and setting up new divisions, among which was the Division of Corporate Services, which made the complainant's post redundant.

Following discussions on 8 and 9 May 2000, the Secretary General wrote to the complainant on 12 May confirming that his position was to be made redundant and that the duties that went with it, as well as certain other duties, would be absorbed into the recently created post of Director of Corporate Services. He informed the complainant that, although Article 1010.1 of the Staff Regulations allowed him to terminate any fixed-term contract before its expiry subject to a notice period of one month per year of service, he deemed it more appropriate to apply Article 1030, relating to redundancy under which a staff member "whose position has become redundant shall be offered transfer to another post ... if a suitable opening is available". However, he was not yet in a position to know whether a suitable vacancy was available in the Geneva Secretariat. The complainant received that letter on 16 May while he was on sick leave, and for that reason did not regard the notice of termination that he was given as valid. After some hesitation the Federation sent him a further notification in a letter of 18 August 2000, in which the Director of the Human Resources Department confirmed that his position was made redundant, but as from 30 September 2000. She said that unless a suitable position became available in the newly structured Secretariat or in the field before that date, his appointment would end on 30 November 2000 pursuant to Article 1030.3 of the

Staff Regulations. In that case he would receive a lump sum equal to two months' base salary, in accordance with Article 1030.4 of the Staff Regulations.

2. On 2 October the complainant appealed to the Joint Appeals Commission. After hearing the Secretary General the Commission found no reason to revoke the decision of 18 August 2000 nor to allow the complainant's claims to a transfer to the position of Director of Corporate Services or to payment of his salary and allowances in full until his contract expired. It also dismissed his claims to moral damages and costs. The complainant was informed on 11 and 21 December 2000 that the Secretary General had decided to endorse the Commission's conclusions and that the decision was to be regarded as "final" within the meaning of Article 1420.7 of the Staff Regulations.

3. The complainant makes the same claims to the Tribunal in addition to seeking the quashing of that decision. As a preliminary claim he seeks the disclosure of the Commission's report, which, without proffering any explanation, the latter had unlawfully failed to send him. The Federation produces the report as an attachment to its reply. The preliminary claim therefore no longer shows any cause of action, though it is surprising that the Federation initially refused what was a legitimate request on the complainant's part. The report shows that the Commission heard the Secretary General on 30 October 2000, but did not hear the complainant or give him access to the Secretary General's observations. That is an inadmissible breach of the rule that both parties must be heard.

4. On the merits the complainant asserts that the decision to terminate his appointment is unlawful. His contract stipulated that he was to be appointed for five years and the Federation could not rely on Article 1010.1 of the Staff Regulations. Nor could it rely on Article 1030.1, which is about redundancies. Even if the latter did apply to his case, it would mean appointing him by transfer to the new post of Director of Corporate Services. In any event, in his view, the decision to end his appointment as Under-Secretary General should have been submitted to the Governing Board in accordance with Article 13(1)(m) of the Constitution.

5. With regard to the complainant's first plea, the Tribunal observes that, even though the Federation based its decision of 18 August 2000 on Article 1030, concerning redundancies, it made the point in its letter of 12 May 2000 and again in its brief to the Tribunal that Article 1010.1 allows it to terminate an appointment by giving one month's notice per year of service. In its surrejoinder it adds that 1010.1 is clear, leaves no doubt as to interpretation and "will have to be applied as it is by the Tribunal". Article 1010.1 says:

"Contracts with fixed terms normally come to an end latest at the date stated therein. However, such contracts may be terminated at any time by either party giving one month's notice per each year of service, with a maximum notice of six months, to take effect at the end of the appropriate month."

The Tribunal observes that, contrary to what the Federation appears to state in some parts of its submissions, 1010.1 may not be interpreted as authorising it to terminate such contracts arbitrarily. Decisions of this kind must be based on unsatisfactory performance, or the interests of the service. Furthermore, there must be no breach of adversarial procedure nor any error of fact or of law, nor abuse of authority, nor obvious misappraisal of the facts. In its decision of 18 August 2000 the Federation opted to apply to the complainant not Article 1010.1 but Article 1030 on redundancy. The validity of the complainant's arguments must therefore be assessed in the light of 1030.

6. With regard to the complainant's second plea, the Tribunal accepts the Federation's assertion that the post of Under-Secretary General for Finance and Administration had to be abolished as part of the restructuring of the Secretariat. Admittedly, Article 1030.1 does not provide for exactly such a case as this, but states that: "A redundancy can occur due to reduced activities as well as for cases when qualifications to handle the job have changed and a staff member with a different background is required." However, there is obviously nothing unlawful about restructuring *per se* and it will always mean regrouping duties and sacrificing posts.

7. But in carrying out such an exercise, an organisation has a duty to observe the rights and safeguards of its staff. To take up his post with the Federation the complainant left a job with the Asian Development Bank in Manila on the strength of a five-year contract, only to have his post abolished nineteen months later. Bearing that in mind, the Federation's first duty in addressing the consequences of his redundancy was to offer him a transfer to another suitable post. Only if that proved impossible should it apply Article 1030.4 of the Staff Regulations. But there is no evidence that the Federation did its utmost to find him a post which matched his skills and level of responsibility. The Secretary General had told him on 12 May that he did not yet know of a suitable post for him in Geneva and that his duties had been incorporated in the new post of Director of Corporate Services. The Federation never

offered to transfer him to that post. And though it did envisage sending him to Abidjan and Delhi, it is plain on the evidence that the complainant stood not the slightest chance of being selected for either post. The procedure to recruit a Head of Regional Delegation for West Africa, in Abidjan, had closed by mid-April 2000, in other words before the complainant's post was abolished, and had led to a candidate being chosen. And although the Federation consulted the National Societies concerned about appointing the complainant, they naturally objected, "both on substantive and procedural grounds", the selection already having taken place, as the Secretary General told the complainant on 12 July 2000. As to the post of Head of Regional Delegation in Delhi, although the complainant applied he was not selected and was so informed on 28 September 2000.

8. The Federation enlisted the services of an outside company to recruit for some of the posts created under the restructuring, but no offer seems to have been made to the complainant. The dossier shows that the Federation failed to do its utmost to reassign, by way of a transfer, an official with a good record whose post had been abolished: it thus failed in its duty to observe the Staff Regulations and to respect the complainant's dignity. The conclusion is that the decision of 18 August 2000, confirmed on 11 December 2000, must be set aside. The Tribunal need not entertain the complainant's pleas that he applied for the post of Secretary General at the same time as the candidate who was appointed to that post and who subsequently took the decision to terminate his appointment, and that the Governing Board should have been consulted before his post was abolished.

9. The Tribunal will not order the complainant's appointment to the post of Director of Corporate Services, since that would be to encroach on the discretionary authority conferred on heads of international organisations, and to reinstate him would be inappropriate. But it will allow his claim to payment of the salary, allowances and all benefits to which he would have been entitled had he stayed in the organisation until 18 October 2003, when his contract was due to expire. The Federation may deduct from the above the sums it has paid pursuant to its decision of 18 August 2000 for the period after 30 November 2000, and the amount the complainant has received in loss of earnings from the Federation's insurance system, and any professional earnings he may have received.

10. The complainant claims moral damages. In the light of all the circumstances of the case, the Tribunal will allow the claim and sets the amount *ex aequo et bono* at 10,000 Swiss francs.

11. Since he succeeds, the complainant is entitled to costs, and the Tribunal awards him 10,000 francs.

12. That being so, the Federation's claim for hearings fails as does its counterclaim to costs.

DECISION

For the above reasons,

1. The decision of the Secretary General of the Federation taken on 18 August 2000 and confirmed on 11 December 2000 is set aside.
2. The Federation shall pay the complainant compensation to be calculated in accordance with 9 above, and moral damages in an amount of 10,000 Swiss francs.
3. The Federation shall pay the complainant 10,000 francs in costs.
4. The complainant's other claims are dismissed.
5. The Federation's counterclaim is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2002.