

**B.**

*v.*

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

**131st Session**

**Judgment No. 4382**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms O. B. against the International Federation of Red Cross and Red Crescent Societies (hereinafter “the Federation”) on 25 October 2018 and corrected on 8 January 2019, the Federation’s reply of 18 April, the complainant’s rejoinder of 5 August and the Federation’s surrejoinder of 7 November 2019;

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 challenges the Secretary General’s decisions to set aside her 2016 performance appraisal only on the basis that it was procedurally flawed, and to insert in her personnel file the impugned decision and the report of the Appeals Commission.

The complainant was seconded to the Federation by the Norwegian Red Cross in 2000 and became a full-time staff member of the Federation as of 1 July 2001. At the material time, she held the position of Senior Officer in the Partnerships and Resource Development Department (PRD). In the context of a reorganisation undertaken by the Federation in 2016, the complainant was appointed Manager *ad interim*, Private Sector Partnerships, effective 1 February 2016 and until the position would be filled by competition. She was also informed that her position of Senior Officer could be affected by the reorganisation, hence she would be

notified as soon as other information would be available. Due to the ongoing structural changes, the Human Resources Department (HRD) extended the deadline for the objective-setting exercise to 30 April 2016. As her first-line supervisor at that time resigned on 30 April 2016, the Director of PRD, Mr O., became *de facto* her first-line manager.

On 31 March 2016 the complainant, who had applied for the position of Manager, Private Sector Partnerships, was notified that she had not been selected for that position. By letter of 14 April 2016, she was informed that her post had finally been unchanged and was confirmed with immediate effect in the position of “Senior Officer, Private Sector Partnerships”. It was also indicated to her that she would report to the Manager, Private Sector Partnerships. The Manager position was filled on 15 August 2016 by Mr F. The latter became her first-line supervisor and Mr O., her second-line supervisor. Since then, both parties agree that the working relationship has been difficult between the complainant and Mr F.

On 6 January 2017, Mr F. signed the complainant’s objectives for the year 2016. The complainant’s annual performance meeting took place on 2 February 2017 and her 2016 annual performance evaluation was signed by Mr F. on 10 February 2017 with an overall rating of “performance needing improvement”. On 27 February 2017, the complainant met with the Director of HRD to express her concerns about the ratings she had received. The Director of HRD informed her by email of 9 March that she could not agree with the complainant’s claims based on her review and advised the complainant to note her concerns in the performance review box as well as to work with her supervisor in order to correct the perceived performance issues and to make progress in the future. On 10 March 2017 a meeting was held with the Directors of HRD and PRD, Mr F., the complainant and a staff representative with a view to dealing with outstanding performance review issues related to the 2016 exercise and discussing a way forward in line with the provisions regarding underperformance.

Following further discussions, the Director of PRD and Mr F. agreed to review the performance evaluation and provided, on 10 April 2017, a revised version with two amendments. On 12 May 2017, the complainant signed her revised performance evaluation noting her intention to appeal the negative ratings.

As of 19 June 2017, the complainant was placed on sick leave. She returned to work at 50 per cent on 30 July and at full time on 14 August 2017.

After going through the informal process of grievance, the complainant filed a formal grievance on 4 August 2017. By decision of 3 October 2017, her grievance was rejected on the basis that the claims of factual errors in the evaluation report as well as bias, prejudice, intimidation and threatening behaviour on the part of her first-line supervisor were not substantiated. The 2016 performance evaluation process was therefore considered to be closed. In the meantime, the complainant and Mr F. underwent a mediation process.

On 8 December 2017 the complainant challenged the 3 October decision before the Appeals Commission.

On 10 January 2018 the complainant submitted a letter of resignation. She separated from service on 31 March 2018.

As of March 2018, the Appeals Commission conducted oral hearings in the form of interviews. In its report dated 1 June 2018, it found that the performance review process for 2016 was tainted with a procedural flaw insofar as the objectives for that year were registered only in January 2017, after the year had elapsed, which had rendered the 2016 appraisal a useless exercise. While it rejected all other allegations, it recommended that the Secretary General quash the performance review report for 2016 and remove it from the complainant's personnel file. It also recommended that she be awarded moral damages in the amount of 20,000 Swiss francs for the procedural flaw as well as 5,000 Swiss francs for costs.

In a letter of 26 July 2018, which is the impugned decision, the Secretary General stated that he disagreed with the Appeals Commission's finding that the relevant provisions had not been followed in relation to the objective-setting. He nevertheless decided to set aside the decision of 3 October 2017 in order to show the Federation's good faith. He further decided to remove the 2016 performance evaluation report from the complainant's personnel file and to replace it by the Appeals Commission's report together with the final decision. The complainant was also awarded 20,000 Swiss francs in moral damages and 5,000 Swiss francs for costs.

The complainant asks the Tribunal to set aside the impugned decision of 26 July 2018 in part, only with respect to the insertion in her personnel file of a copy of the impugned decision and the Appeals

Commission's report. She asks that these two documents be removed and replaced by a certificate stating: "Due to the inaccuracy of and irregularity in the [c]omplainant's 2016 performance evaluation and its procedures, through no fault of the [c]omplainant, after appeal, the [c]omplainant's 2016 performance evaluation was removed from her permanent record, and replaced with this certificate". She seeks additional compensation in the amount of 20,000 Swiss francs for moral damages as well as the reimbursement of all legal fees actually incurred. She also claims interest at the rate of 5 per cent per annum on all amounts paid to her from 8 March 2017 until she receives full payment of all sums. The complainant asks the Tribunal to declare the performance improvement plan initiated for the year 2016 as irregular and tainted by bias and prejudice against her as well as to order such other relief as the Tribunal deems necessary, just and fair.

The Federation requests the Tribunal to dismiss the complaint in its entirety.

#### CONSIDERATIONS

1. The complainant essentially challenges her 2016 performance appraisal on the basis that it was unlawful, procedurally and substantially. The parties request that the complainant's first complaint be joined with her second one, which challenges the establishment of a performance improvement plan (PIP) for her in 2017 after the contested appraisal was completed. The request is rejected as the complaints do not raise the same or similar legal issues (see, for example, Judgments 4000, under 1, and 4171, under 1).

2. On the complaint form, the complainant ticked the box which indicates that she wants oral proceedings, as well as the other one which indicates that she does not. Oral proceedings will not be ordered inasmuch as the Tribunal is sufficiently informed of all aspects of the case to consider it fully on the material which the parties provide in the present proceedings.

3. The complainant impugns the decision of 26 July 2018 on the following grounds:

- 1) The contested performance appraisal violated the Federation's internal rules and guidelines on performance appraisals, as well as the regulations and jurisprudence on unsatisfactory performance, in relation to:
  - (a) The objective setting exercise for the year 2016; and
  - (b) The assessment of her performance during 2016;
- 2) The contested appraisal lacked full consideration of the facts and concrete evidence for the allegations made therein;
- 3) The contested appraisal was not properly evaluated by her second-line manager, the Director of PRD;
- 4) The contested appraisal was tainted by prejudice and bias;
- 5) The contested appraisal was grossly inconsistent with her prior documented track record and contrary to positive feedback in 2016;
- 6) The contested appraisal rested on considerations extraneous to the organisation's interests and therefore amounts to abuse of authority; and
- 7) She was not treated equally with similarly situated staff members.

4. In its report, dated 1 June 2018, the Appeals Commission noted that, in summarizing her internal appeal, the complainant stated that it was to contest the outcome and process of the contested appraisal which was tainted by procedural irregularities, errors of law, mistake of fact and erroneous conclusions, as well as bias and prejudice on the part of her first-level supervisor. The Appeals Commission also noted that the complainant alleged that the appraisal "was (1) irregular and unlawful, as taken in contradiction of the [Federation]'s established regulation and guidelines; (2) arbitrary, as no relevant facts and explanations, consistently provide[d] by [her], were considered; (3) unreasonable and abusive ...; (4) an abuse of authority, as it was motivated by bias and prejudiced [sic] on the part of [her] new [m]anager. Overall, the process of the contested appraisal failed to respect [her] dignity ... and was tainted by bad faith and unfairness."

5. The Appeals Commission found that allegation (1) was sustained in part as the complainant's 2016 appraisal violated the Federation's rules and guidelines on performance appraisals insofar as the objectives

were set after the end of the year under evaluation (2016). Concerning allegation (2), notwithstanding its statement that the complainant's contention that "relevant facts and explanations" which she provided were not considered was "by and large not supported", the Appeals Commission found that "as to those facts that could have been verified following the meeting of March 9, 2017, and, if incorrect, rectified [...], this part of the allegation of arbitrariness is partially sustained". The Appeals Commission further found that the foregoing "procedural breaches entailed a breach of the Federation's duty to treat the [complainant] with dignity, and g[a]ve rise to moral damages [and that] [i]n all other respects, the [Federation] did not violate its [...] rules and guidelines on performance appraisals". The Appeals Commission recommended that the contested appraisal be quashed and removed from the complainant's personnel file and that its report together with the Secretary General's decision and any comments made by the complainant be placed on that file. It further recommended that the complainant be awarded 20,000 Swiss francs in moral damages and 5,000 Swiss francs in legal costs.

6. Although, in the impugned decision, the Secretary General disagreed with the Appeals Commission's findings and recommendations, he followed its recommendations "to show the organization's continued good faith throughout this process". The practical effect of this decision was to accept that the subject performance appraisal was procedurally flawed. In turn, this renders moot any allegation in the present complaint that the appraisal was procedurally flawed. Grounds 1(a) and (b) are accordingly moot as they seek to re-litigate this issue. This is self-evident in the formulation of ground 1(a) and is borne out in the submissions supporting it. In prefacing ground 1(b), the complainant states that although she considers the ratings which she received in the contested appraisal do not reflect the quality of her work during that period, she will not attempt to demonstrate that those ratings were inaccurate nor ask for a new appraisal. Rather, she will demonstrate that the appraisal violated the applicable rules; was based on an error of law and fact; that material facts were overlooked and erroneous conclusions were drawn from the facts. However, whilst some of these latter bases are encompassed in other grounds, the submissions supporting ground 1(b) essentially raise issues concerning alleged procedural violations in the appraisal.

7. Grounds 2, 3 and 5 challenge the contested appraisal on substantive or meritorious bases. However, in the Tribunal's view, the practical effect of the Secretary General's decision to set aside the contested performance appraisal nullified it leaving no scope for it to be challenged on substantive or meritorious bases. In the premises, grounds 2, 3 and 5 are moot. The relief which the complainant seeks appears to mirror this. She merely requests that the impugned decision be set aside in part, only in respect to the insertion in her personnel file of a copy of the impugned decision and the Appeals Commission's report. She asks that these two documents be removed and replaced by a certificate stating: "Due to the inaccuracy of and irregularity in the [c]omplainant's 2016 performance evaluation and its procedures, through no fault of the [c]omplainant, after appeal, the [c]omplainant's 2016 performance evaluation was removed from her permanent record, and replaced with this certificate".

8. The complainant's requests for the removal of the Appeals Commission's report and the impugned decision from her personnel file and to be issued with the certificate are rejected. There is no legal basis for the issue of such a certificate. The Appeals Commission's report and the impugned decision are essential parts of her personnel history which are properly included in her personnel file.

9. It is necessary to consider grounds 4, 6 and 7 as their outcome may affect the quantum of compensation to which the complainant may be entitled.

10. The complainant prefaces her submissions supporting ground 4 by noting that the Secretary General made no reference to the allegations encapsulated therein in the impugned decision, thereby implicitly accepting the Appeals Commission's conclusion that bias, bad faith and prejudice had not been proved.

11. It is well settled that the complainant bears the burden of proving allegations of bias and that, moreover, the evidence adduced to prove the allegations must be of sufficient quality and weight to persuade the Tribunal. It is also recognized that bias is often concealed and that direct evidence to support the allegation may not be available. In these cases, proof may rest on inferences drawn from the circumstances.

However, reasonable inferences can only be drawn from known facts and cannot be based on suspicion or unsupported allegations (see, for example, Judgments 2472, under 9, 3380, under 9, and 4097, under 14).

With regard to prejudice, the Tribunal has stated that although evidence of personal prejudice is often concealed and such prejudice must be inferred from surrounding circumstances, that does not relieve the complainant, who has the burden of proving her or his allegations, from introducing evidence of sufficient quality and weight to persuade the Tribunal. Mere suspicion and unsupported allegations are clearly not enough, the less so where the actions of the organization which are alleged to have been tainted by personal prejudice are shown to have a verifiable objective justification (see, for example, Judgment 3912, under 13). The Tribunal has also stated, in the context of alleged inaccuracies in a staff report, that it is not sufficient to consider in relation to each inaccuracy whether it, standing alone, was an abuse of authority. Rather, it is necessary to consider whether, in the light of the evidence, including the various inaccuracies which it identified, the report as a whole was the result of prejudice on the part of the reporting officer (see, for example, Judgment 2930, under 3).

12. Relying on Judgment 320, under 13, the complainant submits that where a supervisor is unable to explain a discrepancy between a recent negative appraisal report and a history of exemplary reports, the Tribunal should hold that the supervisor's recent assessment cannot be regarded as unbiased. This submission is premised on the allegation encapsulated in ground 5 of the present complaint, which the Appeals Commission had correctly concluded was not proved. The Appeals Commission noted that the evidence showed that beginning in 2010 various managers had indicated in the complainant's annual performance reports that her performance needed to be improved in various areas, particularly in relation to her teamwork and communications skills. The Tribunal notes that in 2010, 2013, 2014, 2015 and 2016, the complainant's competencies for collaboration and teamwork were consistently rated "2". In 2009, 2010 and for each year from 2013 to 2016, her rating for communication was consistently "2". From 2013 her rating for building trust was consistently "2". This slipped to a "1" rating in 2016. Her "3" rating for managing staff performance in 2014 slipped to "2" ratings in 2015 and 2016. This signifies that there was a downward trend in the complainant's competencies ratings over a number of years, which

culminated in an overall “2” rating in 2016. This is inconsistent with the main premise on which she bases her allegation that her 2016 appraisal was tainted with bias. The complainant’s further submissions to support her allegations that her 2016 performance appraisal was tainted by prejudice and bias against her or rested on extraneous considerations are also not proved on the evidence. The evidence rather shows that the working relationship between the complainant and her first-level manager, who was appointed in August 2016, was very difficult and strained. However, there is no evidence that this tainted the appraisal as the complainant contends. Ground 4 is accordingly unfounded.

13. In prefacing her submissions on ground 6, the complainant notes that the Secretary General made no reference to the allegations encapsulated therein in the impugned decision thereby implicitly accepting the Appeals Commission’s conclusion that abuse of authority had not been proved. The Tribunal has observed that in order for there to be misuse of authority, it must be established that the decision rested on considerations extraneous to the organisation’s interests and that the staff member alleging abuse of authority bears the burden of establishing the improper purpose for which the authority was exercised (see, for example, Judgment 4146, under 10).

14. The complainant submits that there is “considerable evidence” of her first-line manager’s improper attitude towards her, “all of which testif[ies] to his personal bias and prejudice against [her], and demonstrate[s] that the contested appraisal was clearly irregularly based on considerations extraneous to the Organisation’s interests [and was not] in accordance with [the Federation’s] guidelines”. She refers, among other things, to “numerous errors and inconsistencies throughout the appraisal, in contrast with the real facts and [the] way [in which her] work was appreciated throughout 2016”. She asserts that neither her first-line manager nor the Director of PRD, who was her direct supervisor until her first-line manager was appointed in August 2016, verified the information even when she pointed out the inaccuracies. She submits that she consistently met her management objectives. She insists that this, coupled with the absence of feedback and constructive well-founded criticism by her first-line manager as contemplated in the Federation’s appraisal framework, vitiated the contested appraisal. She accordingly contends that the Appeals Commission’s report and the impugned

decision must be voided for abuse of authority with an award of moral damages. The Tribunal finds that improper purpose has not been proved on the evidence, and that, moreover, the complainant's assertion that she consistently met her management objectives is not borne out by the evidence. Additionally, as the Appeals Commission found, there is ample evidence that the complainant failed in various instances to cooperate with her newly appointed first-line manager. This was inimical to the Federation's interest. Ground 6 is therefore unfounded.

15. The complainant prefaces her submissions on ground 7 by noting that the Secretary General made no reference to the allegations encapsulated in the impugned decision, thereby implicitly accepting the Appeals Commission's conclusion that unequal treatment had not been proved. The Tribunal's consistent precedent states that the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example, Judgment 4157, under 13).

16. The complainant contends that she was subjected to unequal treatment because the Federation established a PIP for her but did not do so for another employee who had also received an overall "2" rating when there were "no factual or legal differences between [their] 2016 performance appraisal[s] warranting different treatment [...]". She accordingly concludes that "[a]lleged unsatisfactory performance appraisals are therefore unequally dealt with at [the Federation], without any objective justification whatsoever". The tenor of this assertion is that the establishment of the PIP for the complainant after the contested appraisal was completed (but not establishing one for the other employee) tainted the prior appraisal with unequal treatment. This is an obvious non sequitur, and, accordingly, ground 7 is unfounded.

17. The Tribunal also determines that the complainant was adequately compensated by the awards for moral damages and costs.

18. In the foregoing premises, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 16 December 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 18 February 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ