

A. (No. 3)

v.

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

138th Session

Judgment No. 4835

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr K. M. A. against the International Federation of Red Cross and Red Crescent Societies (“the Federation”) on 20 November 2021 and corrected on 22 January 2022, the Federation’s reply of 9 May 2022, the complainant’s rejoinder of 12 September 2022, the Federation’s surrejoinder of 16 December 2022, the complainant’s further submissions of 3 March 2023 and the letter dated 23 May 2023 by which the Federation informed the Tribunal that it had no additional comments to make on the complainant’s further submissions;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision to rescind an offer of employment that had been extended to him, on the basis that he had been disciplined for sexual misconduct.

Facts relevant to this case may be found in Judgments 4833 and 4834, also delivered in public this day, concerning the complainant’s first and second complaints respectively.

The complainant joined the Federation in 2007 and held various positions between 2007 and 2017. On 1 April 2017, he started a new position as Regional Disaster Management Delegate in the “Disaster Crisis Prevention, Response & Recovery” (DCPRR) unit of the Federation’s Africa Regional Office based in Nairobi, Kenya, at grade D-2.

On 29 July 2019, the complainant received a warning letter for breaches of the Code of Conduct and Anti-Harassment Guidelines, which was placed in his personnel file as constituting a disciplinary measure. According to the warning letter, a preliminary assessment concluded that the complainant had failed to accept a female subordinate’s repeated requests to end their personal relationship and had continued to make unwanted contact attempts of a personal or intimate nature, which appeared to have made the female subordinate in question uncomfortable and to have created an offensive working environment.

On 23 August 2019, the Federation’s Human Resources Department (HRD) received a report from another female staff member, who was on loan to the Federation’s office in Nairobi, concerning alleged inappropriate behaviour and unwanted advances made towards her by the complainant. An investigation was carried out, which concluded that the allegations of sexual harassment were substantiated. Following a disciplinary process, on 1 May 2020, the complainant was served with a final letter of warning for breaches of the Code of Conduct and Anti-Harassment Guidelines, involving his conduct towards the female staff member who had reported the allegations on 23 August 2019, which, according to the letter, met the definition of sexual harassment. The final letter of warning constituted a disciplinary measure and was also placed in the complainant’s personnel file. On 29 July 2020, the complainant lodged an appeal to the Federation’s Appeals Commission directed against the 1 May 2020 final letter of warning.

By letter of 3 April 2020, the Director, HRD, notified the complainant of the non-extension of his contract beyond 30 September 2020, “due to lack of funding”. According to the letter, the complainant was “encourage[d] to apply for another suitable position in the Federation”. On 4 May 2020, the complainant asked for an administrative review of the 3 April 2020 decision.

On 12 April 2020, the complainant applied for the position of Regional Disaster Risk Management Delegate in the Federation's Middle East and North Africa (MENA) Regional Office located in Beirut, Lebanon.

On 8 June 2020, the Director, HRD, sent to the complainant a letter asking him to immediately cease and desist all involvement in a "COVID-19 Relief Committee" Facebook group and related activities that he had initiated to mobilize funding to assist people affected by the COVID-19 pandemic in Bangladesh and other countries. According to the letter, the complainant's initiative created an actual or perceived conflict of interest with his responsibilities at the Federation. The letter indicated that it would be placed in the complainant's personnel file.

On 15 June 2020, the MENA Regional Human Resources (HR) Officer informed the complainant that he was the "preferred candidate" for the Regional Disaster Risk Management Delegate position but that "before moving forward, [they] would like to conduct a reference check". He asked the complainant to provide three professional references. While filing the reference form and answering questions about whether the complainant had been the subject of a disciplinary action and had been found to have committed misconduct involving sexual abuse, sexual exploitation or sexual harassment, the complainant's first-level supervisor replied "I would suggest for consulting [the HRD in Geneva] for such question[s]".

On 26 June 2020, the MENA Regional HR Officer extended to the complainant an offer of appointment for the position of Regional Disaster Risk Management Delegate, "subject to a medical clearance, satisfactory reference checks and any other pre-employment checks which may be required" and "contingent on [the complainant] successfully obtaining a visa allowing [him] to work in the duty station". The complainant accepted the offer on the same day.

On 24 July 2020, the complainant's counsel requested the Director, HRD, to remove the 8 June 2020 cease and desist letter from the complainant's personnel file.

By letter of 24 July 2020, the Director, HRD, notified the complainant that the Federation had decided to rescind the employment offer made to him on 26 June 2020. According to the letter, “[s]ubsequent to [the complainant’s] application submitted on 12 April 2020 and the offer extended to [him] on 26 June 2020, the [HR] Manager for the MENA Region undertook the necessary reference checks with the Geneva Secretariat. The reference check revealed that [the complainant] ha[d] been sanctioned for sexual misconduct. [HRD] shared this information with the hiring manager for the new position who [...] decided to rescind the offer.”

On 5 August 2020, the Director, HRD, informed the complainant that he had decided to remove the 8 June 2020 cease and desist letter from the complainant’s personnel file.

On 1 September 2020, the complainant asked for an administrative review of the 24 July 2020 decision to rescind the employment offer made to him. He left the service of the Federation on 30 September 2020.

On 30 October 2020, the complainant’s request for an administrative review was rejected.

On 28 January 2021, the complainant lodged an appeal to the Federation’s Appeals Commission, directed against the 30 October 2020 decision.

On 15 February 2021, as a result of the complainant’s appeal filed against the 1 May 2020 final letter of warning, the Secretary General decided to set aside such disciplinary measure due to a procedural flaw and to reopen the investigation about the complainant.

On 24 June 2021, the Appeals Commission submitted its report and recommendations to the Secretary General regarding the complainant’s 28 January 2021 appeal. The Appeals Commission concluded that “insofar as the Rescission Decision was based on the existence of the Final Warning Letter (and the flawed process on which it was based), the Rescission Decision was likewise invalid and should be set aside”. The Commission however dismissed the complainant’s arguments raised in his appeal involving breach of duty of care, retaliation, malice

and ill will on the part of the Federation. It recommended quashing the rescission decision dated 24 July 2020 and either reinstating the employment offer extended to the complainant or awarding him one year's salary and related benefits as material damages for the loss of opportunity. It also recommended an award of legal costs in the amount of 7,500 Swiss francs. Finally, the Commission made a series of recommendations regarding the Federation's reference check process and disclosures to be made under the Inter-Agency Misconduct Disclosure Scheme.

Following issuance of a revised investigation report and completion of a new disciplinary process, on 30 July 2021, the complainant was advised that the Federation had found that he had committed sexual harassment in violation of the Federation's Code of Conduct and Anti-Harassment Guidelines and that the Secretary General would have issued a final letter of warning as the appropriate disciplinary measure if he had remained employed by the Federation.

By letter of 23 August 2021, the Secretary General informed the complainant of his final decision regarding his 28 January 2021 appeal. The Secretary General decided to follow the recommendation of the Appeals Commission in part and to award the complainant legal costs in the amount of 7,500 Swiss francs. He however declined all other relief recommended by the Commission, since, in his view, "the underlying facts giving rise to the Final Warning Letter existed at the time that the employment offer was rescinded and were later established through a fact-finding investigation and subsequent disciplinary process. The procedural flaw identified by the Appeals [Commission] was later rectified through the reopening of the investigation and, on the basis of certain additional steps taken and a revised investigation report, the relaunching of a disciplinary process." As such "[he] [found] that the letter of 30 July 2021 supersede[d] the Final Warning Letter and provide[d] a legitimate basis for rescission of the employment offer issued by the MENA Regional Office". That is the impugned decision in the complainant's third complaint.

In his third complaint, the complainant asks the Tribunal to set aside the impugned decision and the 24 July 2020 decision rescinding the employment offer made to him. He requests that the employment offer be reinstated as of 25 July 2020, and that he be paid all corresponding salary, benefits and emoluments or, alternatively, that he be paid two years of earnings at the D-1 grade in Beirut, Lebanon, including all entitlements, benefits, emoluments and pension. He further asks to be awarded 100,000 Swiss francs in moral and exemplary damages as well as 15,000 Swiss francs in legal costs. Finally, he seeks the payment of interest as well as “[s]uch other redress that the Tribunal deems necessary, just and fair”.

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

CONSIDERATIONS

1. In the Secretary General’s letter, dated 23 August 2021, which the complainant impugns, the Secretary General accepted the recommendation of the Appeals Commission to award the complainant legal costs in the amount of 7,500 Swiss francs. He however declined all other relief the complainant had requested in his internal appeal. Most notably, the Secretary General declined to accept the Commission’s recommendations to set aside the decision of 30 October 2020 which rejected his request for review directed against the decision of 24 July 2020 to rescind the offer of employment the Federation had made to the complainant on 26 June 2020. In the impugned decision, the Secretary General also rejected the Appeals Commission’s recommendation to either reinstate the employment offer or to award the complainant one year’s salary and related benefits as material damages for the loss of opportunity.

2. Regarding its role when a decision such as this is challenged, the Tribunal has consistently stated, in consideration 7 of Judgment 4412, for example, that the appointment by an international organization of a candidate to a position is a decision that lies within the discretion of its

executive head. It is subject to limited review and may be set aside only if it was taken without authority, or in breach of a rule of form or procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence.

3. Contending that the impugned decision is tainted with bias, personal prejudice, an abuse of authority and breaches of the Federation's duties of good faith, transparency and duty of care towards him, the complainant advances the following grounds to challenge that decision:

- (1) The Appeals Commission violated the complainant's right to a hearing.
- (2) The offer of employment was rescinded in retaliation for him having pursued grievances through the Federation's internal procedures.
- (3) The impugned decision breached the principle of non-retroactivity since the Federation used the letter of 30 July 2021 to justify its decision to rescind an offer of employment.
- (4) The purpose of a warning letter is only to warn staff and could not have been used as a basis to rescind the employment offer.

4. In the first ground, the complainant submits, in substance, that the Appeals Commission prevented him from attending the hearing of the witnesses it called to permit him to test the evidence, and, in any event, that he was not even provided with the statements of such witnesses. This, it did, on the basis that doing so is not foreseen by the Staff Rules and Regulations and had not been its practice.

5. The Federation relies on Judgment 4408, where the Tribunal concluded, in consideration 4, that an interview conducted as an "investigative measure" to enable an appeal body to obtain general information not relating specifically to the situation of the complainant was not a hearing where the complainant was required to be present or where the content of the discussion had to be disclosed to him or her.

The Federation argues that the complainant's submissions are based upon what it refers to as his mischaracterization of the process the Appeals Commission conducted. In effect, the Federation's central submission on this issue is that the interviews the Appeals Commission conducted constituted "investigative measures", as this expression is used in Judgment 4408.

6. The Tribunal notes that there are no records of the interviews in the file and that there is no evidence that the complainant was given access to the statements of the persons who were interviewed by the Appeals Commission. The Commission states, in its report, that in addition to the complainant, it interviewed the Human Resources (HR) Manager for the Federation's Middle East and North Africa (MENA) Regional Office, the Head of Disaster Crisis Prevention, Response & Recovery (DCPRR), the Regional Director for MENA and the Director of the Human Resources Department (HRD). It is obvious from paragraphs 13 and 14 of its report that the Commission interviewed these Federation staff on various issues which touched and concerned "the circumstances in which the offer was rescinded". This tends to demonstrate that the information sought by the Commission was not of a general nature, and that it was relating specifically to the rescission of the offer of employment at issue. In these circumstances, the Tribunal considers that the complainant had a right, at least to have been apprised of the content of the interviews and to provide his comments if he so wished. Since this was not done, the complainant's right to be heard was violated, which alone requires setting aside the impugned decision, without there being any need to examine the other pleas on this ground. The complainant is entitled to an award of moral damages for the procedural flaw in the internal appeal procedure. For this, which is an infringement of due process, he will be awarded 15,000 Swiss francs.

7. The complainant argues in the third ground that the Secretary General erred when he concluded, in the impugned decision, that "the letter of 30 July 2021 supersedes the Final Warning Letter [of 1 May 2020, which was set aside on 15 February 2021] and provides a legitimate basis for rescission of the employment offer". It is unnecessary to

address this plea because, in any case, no moral damages should be awarded on this account since the complainant has not established that he suffered any moral injury resulting from this alleged flaw.

8. The Tribunal will not grant the complainant's claims that the 24 July 2020 decision be set aside and that the 26 June 2020 offer of employment be reinstated. The complainant's argument that by quashing the final warning letter of 1 May 2020, the Secretary General "invalidated the basis upon which the employment offer was withdrawn" is unfounded. The evidence shows that, in his 24 July 2020 letter informing the complainant that the employment offer had been rescinded, the Director, HRD, justified this decision based on "reference checks [...] [which] revealed that [the complainant] ha[d] been sanctioned for sexual misconduct". At the time when the 24 July 2020 rescission decision was made, the complainant had been sanctioned twice for breaches of the Code of Conduct and Anti-Harassment Guidelines. Before the 1 May 2020 final letter of warning which was eventually set aside, the complainant had received, on 29 July 2019, a first warning letter, following a preliminary assessment which concluded that he "had failed to accept a female subordinate's repeated requests to end their personal relationship and had continued to make unwanted contact attempts of a personal or intimate nature, which appeared to have made the female subordinate in question uncomfortable and to have created an offensive working environment". Therefore, the mention of "reference checks [...] [which] revealed that [the complainant] ha[d] been sanctioned for sexual misconduct" in the 24 July 2020 rescission decision can be regarded as covering the 29 July 2019 warning letter issued to the complainant, which alone provided a sufficient legal basis for the Federation to decide to rescind the conditional employment offer that had been extended to him on 26 June 2020.

9. The complainant's argument in the fourth ground that a warning letter cannot be used to rescind an employment offer since it is "the second least serious disciplinary sanction open to the Secretary General" is also unfounded. The Tribunal considers that the complainant's conduct underlying the 29 July 2019 warning letter is likely to have

compromised the trust between him and the Federation, regardless of the type of disciplinary measure which was ultimately imposed.

10. Finally, the complainant's contention in the second ground that the offer of employment was rescinded in retaliation for him having pursued grievances through the Federation's internal procedures is not supported by the evidence. The complainant bears the burden of establishing retaliation (see Judgment 4357, consideration 9) and he has not done so. As noted above, the Federation withdrew the conditional offer of employment based on a reference check revealing that the complainant had been sanctioned for sexual misconduct, which it was entitled to do as part of the exercise of its discretionary power.

11. As the complainant has succeeded in his request to set aside the impugned decision, he will be awarded costs in the amount of 10,000 Swiss francs. There are however no bases on which to accept the complainant's claim for exemplary damages, which are only warranted in exceptional circumstances that are not evident in this case. The complainant's claim to be awarded such other redress as the Tribunal deems necessary, just and fair should be rejected as it is too vague to be receivable (see, for example, Judgment 4602, consideration 8).

DECISION

For the above reasons,

1. The impugned decision of 23 August 2021 is set aside.
2. The Federation shall pay the complainant 15,000 Swiss francs in moral damages for the procedural flaw in the internal appeal procedure.
3. It shall also pay him 10,000 Swiss francs in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 8 May 2024, Mr Patrick Frydman, President of the Tribunal, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, Mr Jacques Jaumotte, Judge, Mr Clément Gascon, Judge, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

MICHAEL F. MOORE

HUGH A. RAWLINS

JACQUES JAUMOTTE

CLÉMENT GASCON

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER