B. (No. 2)

v.

International Federation of Red Cross and Red Crescent Societies

131st Session **Judgment No. 4383**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms O. B. against the International Federation of Red Cross and Red Crescent Societies (hereinafter "the Federation") on 18 April 2019 and corrected on 23 May, the Federation's reply of 9 September, the complainant's rejoinder of 29 November 2019 and the Federation's surrejoinder of 9 March 2020;

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 decision to impose on her a performance improvement plan.

At the material time, the complainant held the position of Senior Officer in the Partnerships and Resource Development Department (PRD). On 10 February 2017 the complainant's first-line supervisor, Mr F., signed her 2016 annual performance evaluation with an overall rating of "performance needing improvement". On 10 March 2017 a meeting was held with the Director of the Human Resources Department (HRD), the Director of PRD, Mr F., the complainant and a staff representative with a view to dealing with any outstanding performance review issues related to the 2016 exercise and discussing a way forward in line with the provisions regarding underperformance. It was decided that her

performance would be reviewed and that they would meet again to develop an action plan for improvement.

In June 2017 the complainant was invited to discuss the Performance Improvement Plan (PIP). By email of 8 June 2017, she requested that the meeting be postponed pending completion of her internal appeal against the 2016 performance evaluation, which request was granted by HRD on an exceptional basis.

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.

By decision of 3 October 2017, the complainant's grievance related to the 2016 performance evaluation process was rejected.

On 15 November 2017 the meeting on the PIP took place as the Administration considered the 2016 performance evaluation process closed. The notice of improvement period was set from 15 November 2017 to 28 February 2018. From that moment, the complainant inquired about the grounds on which a PIP was imposed upon her and kept contesting its implementation. By email of 22 November 2017, HRD indicated to the complainant that the PIP related to current behaviours of the complainant which still existed and which were also reflected in the 2016 assessment.

By e-mail of 13 December 2017, the complainant inquired about the possibility of taking unpaid leave due to the difficult situation at work. On 5 January 2018 she was told that she could not be granted unpaid leave on that basis. On 10 January 2018 the complainant submitted a letter of resignation stating that she was forced to leave her post because of the situation with her manager that remained unresolved. She added that the manner in which she had been treated amounted to constructive dismissal.

The complainant proceeded on sick leave from 10 January to 20 February 2018. She returned to work at 50 per cent from 21 February to 6 March and then took annual leave from 7 March until she separated from service on 31 March 2018.

On 30 March 2018 she submitted a formal grievance contesting the PIP, which was rejected on 31 May 2018.

By letter of 26 July 2018, which is the impugned decision in the complainant's first complaint before the Tribunal, the Secretary General set aside the decision of 3 October 2017 and decided that the 2016 performance evaluation should be removed from the complainant's personnel file.

On 27 August 2018 the complainant lodged her second internal appeal, challenging the 31 May 2018 decision to reject her grievance. Having held oral proceedings, the Appeals Commission submitted its report, dated 8 January 2019, in which it found that the PIP was not "devoid of merit". The Appeals Commission concluded that the complainant had not succeeded in establishing any of her allegations. By letter of 21 January 2019, the Secretary General endorsed the Appeals Commission's recommendations and dismissed the complainant's second internal appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision of 21 January 2019, to declare null and void the 2017 PIP and to order its withdrawal from her personnel file. She further asks the Tribunal to declare the PIP as having been tainted by bias and prejudice causing irreparable harm to her dignity and reputation as a long serving staff member and amounting to a constructive termination of her appointment. She seeks the payment of all her salary, benefits, step increases, pension contributions and other emoluments she would have received from the effective date of her alleged constructive dismissal, 31 March 2018, to her statutory date of retirement, 30 September 2028, with deduction of any income earned during that period. Alternatively, she seeks compensation for the termination of her contract as a result of constructive dismissal in an amount equal to 12 months' salary. She further seeks 100,000 Swiss francs for moral damages as well as the reimbursement of all legal fees actually incurred. The complainant asks to be awarded interest at the rate of 5 per cent per annum on all amounts paid to her from 30 March 2018 until she receives full payment of all sums. She also seeks 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. For the reasons stated in consideration 1 of Judgment 4382, which is delivered in public on this day on the complainant's first complaint, the request for the joinder of her first complaint with this complaint is rejected.

2. The complainant requests oral proceedings in this case. 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 voluminous materials and detailed submissions which the parties provide in these proceedings.

3. In her internal appeal, the complainant challenged the decision of 31 May 2018 to reject her grievance, filed on 30 March 2018. In her grievance, she alleged, in effect, that the Administration's proposal to subject her to a PIP from 15 November 2017 to 28 February 2018 was unlawful. She also alleged that the circumstances surrounding that proposal forced her to submit a letter of resignation on 10 January 2018, which amounted to constructive dismissal. In the impugned decision of 21 January 2019, the Secretary General accepted the Appeals Commission's finding that the complainant's allegations were not proved and its recommendation that no remedy should be provided to her. The Appeals Commission had specifically concluded the following:

> "(i) The PIP was not 'devoid of merit'; to the contrary, it arose out of, and was based on, managerial observations of certain performance shortcomings that the [complainant] had demonstrated in 2016 and in previous assessment years that had yet to be addressed and continued to 'need improvement';
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> (ii) The imposition of the PIP by the Federation followed the applicable internal rules and procedures;
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> (iii) The [Federation] did not fail to meet a 'burden of proof' in imposing the PIP;
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> (iv) The [complainant] failed to prove that the PIP was motivated by improper reasons, bias or prejudice or amounted to an abuse of authority;
>
> (v) The [complainant]'s decision to resign from the [Federation] while the PIP was still underway in January 2018 did not amount to constructive dismissal; and
>
> (vi) The [complainant] has not demonstrated that she was treated in a disparate manner in relation to similarly situated staff."

4. In this complaint, the complainant contends that the proposed PIP was devoid of merit; violated the Federation's applicable rules; was motivated by improper reasons, namely, bias, prejudice and abuse of authority; violated the principle of equal treatment and forced her to resign under duress amounting to constructive dismissal.

5. It is convenient to set out the Federation's applicable procedure for the establishment of a PIP for a staff member whose work does not meet performance requirements and expectations and is accordingly unsatisfactory. It is contained in Staff Regulation 2.6.0, particularly Regulations 2.6.1 to 2.6.5, which provide as follows:

"2.6.1 Unsatisfactory performance may result from one or more of the following situations:

a) when an Employee does not perform the functions and tasks established in his/her job description and/or objectives defined in his/her work plan to the satisfaction of his/her line manager(s);

b) when an Employee fails to establish and maintain satisfactory working relationships with other Employees, due for instance to unsuitable communication skills, team work skills or attitude;

c) when an Employee proves unsuitable for international service insofar as he/she fails to maintain satisfactory working relationships with persons with whom he/she should interact, both within the International Red Cross and Red Crescent Movement and beyond.

2.6.2 When a line manager considers that an Employee does not meet performance requirements and expectations, that line manager shall, after consultation with the second line manager, Human Resources, and the technical manager if appropriate:

a) either document at the regular annual or mid-year performance appraisal meeting with the Employee his/her concerns regarding the Employee's performance;

b) or document the performance issues at an extraordinary performance meeting with the Employee, if performance issues arise outside the regular performance appraisals.

2.6.3 The line manager shall formally notify Human Resources of the Employee's unsatisfactory performance within 15 days of either the regular or extraordinary performance appraisal meeting.

2.6.4 Human Resources shall convene another meeting with the line manager(s) and the Employee, with a view to agreeing on a plan for the improvement of the Employee's performance. However, if, in the opinion of the line manager(s) and Human Resources, this second meeting reveals that the Employee's unsatisfactory performance is

> mainly due to any other circumstances such as interpersonal conflicts, or duties and responsibilities of his/her Post exceeding his/her qualifications, skills and experience, a mutually agreed solution may be identified.
>
> 2.6.5 If, after the above-mentioned meeting, the line manager(s) and Human Resources consider that improvement of performance has to be made, the Employee shall be given a formal three-month written notice for improvement outlining expected improvements to be made regarding specific elements considered as unsatisfactory at that time or at the time of the Employee's last work review and/or performance appraisal. The written notice shall also specify which support and guidance will be provided to the Employee in order to help him/her to improve his/her performance." (Original emphasis.)

6. The complainant submits that the PIP, which was proposed in 2017, could not exist independently of her 2016 performance appraisal that the Secretary General set aside in the decision of 26 July 2018 impugned in her first complaint. The Tribunal notes that there has been some uncertainty concerning the basis of the PIP and the complainant submits that its justification is unclear. The Federation however asserts that it is clear "that the PIP stemmed from [the complainant's] 2016 performance evaluation and that her performance had not improved in 2017".

7. By way of background, the Federation states that the Administration's intention was to place the complainant on a PIP and that her first-line manager mentioned it to her on 2 February 2017 and that that intention was reiterated at the meeting of 10 March 2017, which the complainant, her two line managers, the Senior HR Operations Coordinator and a Staff Association Representative, at the request of the complainant, attended. According to the Federation, the complainant's 2016 performance appraisal was discussed at that meeting and it was agreed that her line managers would review her 2016 appraisal. It is however noteworthy that the Federation states, with reference to that meeting, that Staff Regulation 2.6.4 provides for the implementation of a PIP in case of "unsatisfactory performance". This reference seems to suggest that the 10 March meeting, which was a follow-up to a prior meeting on 8 March 2017, may have been seen as the "another meeting" which HR had convened under Staff Regulation 2.6.4. It is also apparent that up to that point, the justification for the proposed PIP was the complainant's 2016 performance appraisal.

8. In the Tribunal's view, however (albeit that it was after the event of the proposal of the PIP), the legal efficacy of the complainant's 2016 performance appraisal as a justification for the PIP was removed when the Secretary General set aside that appraisal on 26 July 2018. That is because unsatisfactory performance, which is a condition precedent for proposing or establishing a PIP, could not be sustained on the 2016 appraisal. It is however apparent that later in 2017 the Federation sought to justify the PIP on current concerns with the complainant's communication and teamwork, as well as attitude. This reference was to unsatisfactory performance under Staff Regulation 2.6.1b).

9. The evidence shows that discussions concerning the establishment of a PIP for the complainant resumed at the 15 November 2017 meeting following its postponement at the complainant's request. She had also proceeded on sick leave after which the Administration instituted a mediation process which unsuccessfully attempted to resolve the difficult working relationships between the complainant and her first-line manager. The complainant points out that at the 15 November meeting she indicated that it appeared that the PIP was being pursued for reasons other than her 2016 performance appraisal and that the Director of HRD explained that the PIP was a separate process from that appraisal and that it was being proposed to address competencies that currently needed improvement. The Director of HRD confirmed this in an email to the complainant on the same date (15 November) relevantly stating as follows:

> "During this meeting, you presented a statement [...] regarding the 2016 performance appraisal and your perception about this [PIP]. I responded that the PIP is a separate process from the 2016 Annual Performance Appraisal; it is not related to any pending appeal process, and it addresses competencies that currently need improvement."

The then Senior HR Operations Coordinator essentially repeated this in an email of 22 November 2017 to the complainant, stating, among other things, that her 2016 performance appraisal was now closed and that it had no bearing on the PIP process. She further stated that it was stressed that the PIP related to current behaviours which were also displayed and reflected in her 2016 appraisal, which behaviours still existed based on feedback from her supervisors and others.

10. The Federation points out that on 23 November 2017 the complainant objected to the proposed PIP on the ground that it had not complied with Staff Regulation 2.6.2 because there was no meeting to document her unsatisfactory performance in 2017. In that message the complainant stated, as follows, among other things:

> "According to my reading of the staff regulations, a PIP can only be initiated as a result of meeting(s) outlined in clause 2.6.2 a) or b) neither of which has taken place.
>
> Thanks for advising where this 2017 PIP has originated from."

In a reply email message, dated 5 December 2017, the Director of HRD restated the basis of the PIP to "dispel any misunderstanding" as, in her view, the complainant had misconstrued the 15 November 2017 email message to mean that the PIP was not related to the 2016 performance appraisal. She relevantly stated that "as you are aware, the competencies addressed in the PIP are related to, and some stem from those identified in your 2016 performance review. For the purposes of clarification, let me reiterate that this statement was solely intended to confirm that your 2016 performance review is now officially closed regardless of the [Appeals Commission's] review." The implication was that the PIP was related to what the Administration saw as the complainant's unsatisfactory performance in the identified competencies over a period of time, which were also identified in the 2016 performance appraisal but which had not improved and continued to be evidenced in 2017 requiring a PIP to be established.

11. Against this background, Staff Regulation 2.6.2b) required the complainant's first-line manager, after consultation with the second-line manager, Human Resources and the technical manager, if appropriate, to document the complainant's performance issues at an extraordinary performance meeting with the complainant. There is however no evidence that such a meeting took place to document the current performance concerns. There is also no evidence that the first-line manager formally notified HRD of the complainant's unsatisfactory performance in relation thereto as Staff Regulation 2.6.3 required. It seems that the 15 November 2017 meeting was intended to meet the requirements of Staff Regulation 2.6.4 and that the issuance of the notice of the PIP to the complainant at the meeting of 15 November 2017 was intended to meet the requirements of Staff Regulation 2.6.5. By not observing the requirements of Staff Regulations 2.6.2b) and 2.6.3, the Administration

violated its own procedural rules for the establishment of the subject PIP. The Appeals Commission therefore erred when it found that the imposition of the PIP by the Federation followed the applicable internal rules and procedures. As the Secretary General maintained this finding in the impugned decision of 21 January 2019, that decision will be set aside to the extent that it maintained this finding by the Appeals Commission. The breach by the Federation of its own rules caused the complainant moral injury entitling her to moral damages, for which the amount of 15,000 Swiss francs will be awarded. The Federation will also be ordered to remove the PIP from the complainant's personnel file.

12. However, as the Appeals Commission found and the Secretary General accepted in the impugned decision, the complainant has failed to prove that the PIP was motivated by improper purpose, namely, bias, prejudice and abuse of authority. The Administration's actions which the complainant alleges were so tainted are shown by the evidence to have had verifiable objective justifications and were not motivated by improper purpose (see, for example, Judgments 3380, under 9, 3912, under 13, and 4146, under 10). The Administration was genuinely concerned that the complainant had not maintained required performance standards related to communication and teamwork, as well as her attitude. The Administration was also concerned that the complainant was taking no steps to improve those competencies and proposed the PIP with a view to improvement.

13. The complainant's allegation that the establishment of the PIP violated the principle of equal treatment is unfounded. Her reliance on the fact that a staff member who received a similar overall rating in 2016 as she had received in her 2016 performance appraisal was not put on a PIP is irrelevant inasmuch as the Administration has justified its attempt to establish the PIP for the complainant on alleged unsatisfactory performance in areas which she still needed to improve in 2017. She had not acknowledged the need to improve them. The complainant provides no evidence that there was any other staff member who was in an identical or similar situation and who was treated dissimilarly (see, for example, Judgment 4157, under 13, and the case law cited therein).

14. Contending that the misuse of the PIP amounted to constructive dismissal, the complainant argues that the PIP and the Administration's attitude in imposing it breached the Federation's fundamental obligations which it had towards her. She states that those circumstances left her with no choice but to tender her resignation under duress after 17 years of service when she had no intention to leave the organisation. She further states that she only did so because of the Administration's bad faith in managing her performance appraisal and because of its failure to support her in the difficult work relationship with her manager.

15. In Judgment 4231, under 10, citing Judgment 2745, under 13, for example, the Tribunal stated that constructive dismissal signifies that an organisation has breached the terms of a staff member's contract in such a way as to indicate that it will no longer be bound by that contract. A staff member may treat that as constituting constructive dismissal with all the legal consequences that flow from an unlawful termination of the contract, even if she or he has resigned. In Judgment 2435, under 17, the Tribunal stated that the notion of constructive dismissal is a convenient expression to indicate that an employer has acted in a manner inconsistent with the further maintenance of the employment relationship entitling the employee, if she or he so elects, to treat the employer's actions as terminating the employment. In the event that the employee so elects – usually by tendering her or his resignation – consequential rights and obligations are determined on the basis that it was the employer, not the employee, who terminated the employment.

16. The Tribunal has found no evidence that supports the complainant's allegation that the PIP was proposed for an improper purpose. It has found that the Administration acted out of genuine concern that the complainant's communication and teamwork, and her attitude should improve. The fact that the applicable procedure for establishing the PIP was not followed does not obviate that concern. The Tribunal finds no evidence to support the complainant's allegation that the Administration acted in bad faith in its attempt to establish the PIP. Moreover, contrary to the complainant's assertion, the Federation took steps to resolve the tensions caused by the difficult working relationship between her and her first-line manager and there is no evidence on which to hold that the Federation breached its duty of care towards her.

17. The evidence shows that the Director of HRD responded to a message of 18 August 2017 in which the complainant requested such assistance. She met and discussed the matter with the complainant on 24 August 2017. On that same date, the Director of HRD offered to provide mediation between the complainant and the first-line manager, as well as psychosocial support to mitigate any work-related stress. An external mediator met with the complainant and her first-line manager on 5 September and 14 November 2017. The mediation was unsuccessful. After the meeting of 15 November 2017, and the complainant's continued expression of concern about the establishment of the PIP, she sought unpaid leave. She indicated it would have allowed her to seek other employment opportunities. At a meeting on 5 January 2018, the Director of HRD explained to the complainant that the Secretary General would not have granted the complainant leave for the reason for which she requested it. Her second-line manager at the material time further intervened to attempt to resolve the situation. However, the complainant tendered her resignation on 10 January 2018. The Secretary General met with her on 22 January 2018 to discuss her resignation letter, indicating that he did not accept it, and asked her to suggest alternative options. He however did not accept the alternatives which she proposed on the ground that they were beyond what the Staff Regulations permitted. The Tribunal does not find that constructive dismissal is proved in light of this evidence.

18. As the complainant succeeds in part, she will be awarded costs in the amount of 4,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision of 21 January 2019 is set aside to the extent mentioned in consideration 11 of this judgment.

2. The Federation shall pay the complainant moral damages in the amount of 15,000 Swiss francs.

3. The Federation shall remove the PIP from the complainant's personnel file.

4. The Federation shall also pay the complainant costs in the amount of 4,000 Swiss francs.

5. All other claims are 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