

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

A. (No. 4)

v.

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

138th Session

Judgment No. 4836

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth 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 his non-selection for several positions.

Facts relevant to this case may be found in Judgments 4833, 4834 and 4835, also delivered in public this day, concerning the complainant’s first three complaints.

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.

By letter of 3 April 2020, the Director, Human Resources Department (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 by consulting [the Federation’s website] or discussing with Human Resources”.

Between 20 November 2019 and 11 June 2020, the complainant applied for six positions in the Federation: Disaster Risk Management Coordinator (Pacific) on 20 November 2019, Regional Disaster Risk Management Delegate in the Middle East and North Africa (MENA) Regional Office on 12 April 2020, Regional Operations Manager (Lead) COVID-19 for the Africa Region on 1 May 2020, and Operations Manager for the Asia Pacific Region, Operations Manager for Afghanistan and Operations Coordinator for the MENA Region on 11 June 2020.

The complainant was not shortlisted for the positions of Operations Manager for the Asia Pacific Region and Operations Coordinator for the MENA Region. The position of Operations Manager for Afghanistan was cancelled.

On 17 January 2020, the complainant was interviewed for the position of Disaster Risk Management Coordinator (Pacific). Following his interview, he was not recommended by the panel.

On 7 May 2020, the complainant took a written test for the position of Regional Operations Manager (Lead) COVID-19 for the Africa Region. He was subsequently not invited to participate in an interview.

On 26 June 2020, the complainant received an offer of appointment for the position of Regional Disaster Risk Management Delegate in the MENA Regional Office which was later rescinded on 24 July 2020, following a reference check revealing that he had been sanctioned for sexual misconduct.

On 30 September 2020, the complainant separated from the Federation. On the same day, he asked for an administrative review of the recruitment processes which led to his non-selection for the positions of Disaster Risk Management Coordinator (Pacific), Regional Operations Manager (Lead) COVID-19 for the Africa Region, Operations Manager for the Asia Pacific Region, Operations Manager for Afghanistan and Operations Coordinator for the MENA Region. On 27 November 2020, the complainant's requests for an administrative review were rejected.

On 25 February 2021, the complainant lodged an appeal to the Federation's Appeals Commission, directed against the 27 November 2020 decision.

On 24 June 2021, the Appeals Commission submitted its report to the Secretary General, in which it recommended to reject the complainant's appeal. The Commission concluded that the recruitment processes in question "were carried out in accordance with the Federation's internal rules" and found "no basis to question the Federation's conclusion that another candidate was more qualified and suitable than the [complainant] for the position[s] in question". The Commission "d[id] not find that the [complainant]'s disciplinary record contributed in any way to his non-selection for these positions". Finally, the Commission "d[id] not find that the Federation breached its duty of care towards the [complainant] in the manner in which these various recruitment processes were handled".

On 23 August 2021, the Secretary General informed the complainant that he had decided to follow the Appeals Commission's recommendation and to reject his appeal. That is the impugned decision in the complainant's fourth complaint.

In his fourth complaint, the complainant asks the Tribunal to set aside the selection decision for the position of Regional Operations Manager (Lead) COVID-19 for the Africa Region as well as "any other selection decisions that are flawed" and to resume the selection processes. He requests that it be recognized that he "suffered a loss of opportunity, material and moral damages" due to "breaches" in the selection procedures at issue and that the Federation "fail[ed] to make reasonable efforts to find him an alternative assignment". He seeks

material damages in the amount of 100,000 Swiss francs or “equivalent to one year’s loss of salary”. He further asks to be awarded 25,000 Swiss francs in moral damages as well as 15,000 Swiss francs in legal costs. Finally, he requests 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 and submits that some aspects of the complaint are irreceivable.

CONSIDERATIONS

1. In the letter, dated 23 August 2021, which the complainant impugns, the Secretary General accepted the unanimous recommendation of the Appeals Commission to dismiss the complainant’s internal appeal against the decision of 27 November 2020, which rejected his requests for an administrative review of the recruitment and selection processes which led to his non-selection for five positions for which he had applied, namely, Disaster Risk Management Coordinator (Pacific), Regional Operations Manager (Lead) COVID-19 for the Africa Region, Operations Manager for the Asia Pacific Region, Operations Manager for Afghanistan and Operations Coordinator for the Middle East and North Africa (MENA) Region. The Commission concluded that the selection processes for the subject positions were conducted in accordance with the Tribunal’s case law and the Federation’s applicable rules. As well, the Commission concluded that there was no basis on which to question the selection decisions and that there was no breach of the Federation’s duty of care towards the complainant in the selection processes for those positions. In this complaint, the complainant challenges the Secretary General’s acceptance, in the impugned decision, of the Appeals Commission’s conclusion that the selection processes with regard to the contested positions were, in effect, lawful.

2. As to its role in a case where the selection of a successful candidate is challenged in a complaint, the Tribunal recalls its settled case law, stated, for example, in Judgment 4625, that in matters of appointment, the choice of the candidate to be appointed lies within the

discretion of the authority competent to make the appointment within the organization concerned. Such a decision is therefore subject to only limited review. It may be set aside only if it was taken without authority or in breach of a rule of form or of 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 (see, in particular, Judgments 3652, consideration 7, and 3372, consideration 12). As a result, a person who has applied for a post that an organization has decided to fill by a competition and whose application is ultimately unsuccessful must prove that the selection procedure was tainted by a serious defect.

The case law further states that, nevertheless, anyone who applies for a post to be filled by some process of selection is entitled to have her or his application considered in good faith and in keeping with the basic rules of fair and open competition (see, for example, Judgment 4412, consideration 10). That is a right which every applicant must enjoy, whatever her or his hope of success may be (see, *inter alia*, Judgments 3209, consideration 11, and 2163, consideration 1, and the case law cited therein). The case law also states that an organization must abide by the rules on selection and, when the process proves to be flawed, the Tribunal can quash any resulting appointment, albeit on the understanding that the organization must ensure that the successful candidate is shielded from any injury which may result from the cancellation of her or his appointment, which she or he accepted in good faith (see, for example, Judgment 3652, consideration 7). The Tribunal also recalls that, in relation to competitions, it is not its role to replace the assessment made by the competent selection bodies with its own assessment (see, for example, Judgment 4594, consideration 8).

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 challenges that decision:

- (1) Although the Federation's Staff Regulations favour internal candidates over external applicants when internal candidates are available, he was not given any priority consideration in the selection processes for the five subject positions for which he applied.
- (2) The selection processes for the positions of Disaster Risk Management Coordinator (Pacific), Regional Operations Manager (Lead) COVID-19 for the Africa Region and Operations Manager for the Asia Pacific Region were unlawful because of serious defects and breaches of the Federation's procedures.
- (3) In breach of its duty of care and duty to act in good faith, the Federation failed to make reasonable efforts to find him (the complainant) alternative employment following the non-renewal of his contract.
- (4) The Appeals Commission violated the complainant's right to a hearing.

4. Regarding the Federation's regulatory provisions, which are applicable to the selection of staff to fill vacant posts, Staff Rule 5.1 states that the paramount criteria governing the selection of staff shall be their competence, integrity and devotion to the cause served by the Federation. Staff Rule 5.2 states that posts shall be filled by recruitment from the member National Societies of the International Federation, by internal promotion or rotation or by external recruitment and the Secretary General shall appoint the staff keeping in mind the principle of diversity when this is consistent with competence. Staff Rule 5.3 states, in effect, that positions may not necessarily be filled through a competitive process. Staff Regulation 5.1.2 states that the selection amongst applicants to any post is based on competence for that post (including, but not limited to, qualifications, experience, skills and values), integrity and devotion to the cause served by the Federation and that in cases of equal competencies amongst candidates for a post, diversity will be taken into account. Staff Regulation 5.4.1 provides the four mechanisms, whether by internal or external recruitment, by which employees are to be selected or recruited to vacant positions at the

Federation. Staff Regulation 5.4.3 states that vacancies for posts in the initial stage of an emergency response operation may be filled according to specific Human Resources guidelines, either by competition, or in accordance with Regulation 5.3.1(c), Regulation 5.4.5, or Regulation 5.4.6. Staff Regulation 5.5.3 states that for any recruitment, Human Resources is responsible for shortlisting applications in a fair and equitable manner, in full consultation with, and final agreement by, the hiring manager; shortlisting may involve practical or written verification of the knowledge or skills of the applicants and/or preliminary interviews, as determined by the hiring manager and Human Resources; shortlisting may involve external specialists, and should be carried out in a manner that enhances diversity.

5. The complainant's third ground is outside the scope of the present complaint, which centrally challenges decisions not to select the complainant for the subject positions for which he had applied. Moreover, the complainant presented the same ground in support of his second complaint before the Tribunal, and the Tribunal addressed it in Judgment 4834, which is also delivered in public this day. The Tribunal has already recalled that, in accordance with a recognised general principle of law, a person cannot submit the same matter for decision in two separate proceedings (see, for example, Judgments 4778, consideration 5, 4530, consideration 7, 4085, consideration 7, 3291, consideration 6, and 2742, consideration 16).

6. Regarding the first ground, the complainant submitted, in effect, that the Federation should have limited the selection process for the five contested positions to internal candidates only on the basis of its rules. In passing, he refers to Staff Rules 5.1 and 5.2, among others, and some of the Staff Regulations which are set out in consideration 4 of this judgment. He relies, in particular, on Staff Regulation 5.4.1 to support his contention that the selection process for the five contested positions, which had been advertised both internally and externally, should have been restricted to internal staff members of the Federation.

7. Staff Regulation 5.4.1 states that recruitment of an employee will be carried out through one of the following mechanisms: (a) internal recruitment as one of the mechanisms to ensure internal promotion or transfer, when the relevant skills, experience and professional qualifications for the post are likely to be available amongst current Federation staff. In that case, only current Federation employees, seconded staff currently seconded to the Federation and national staff are eligible to apply; (b) extended internal recruitment, where only current Federation employees, seconded staff currently seconded to the Federation, national staff and current employees and volunteers of National Societies are eligible to apply; (c) internal recruitment in the context of the Global Mobility Programme, as described in Section 5.6.0; and (d) external recruitment, when the position requires technical skills, experience or professional qualifications unlikely to be available among current Federation staff, or when a different skill set and external experience for the position or within the existing team is needed, in which case anyone is eligible to apply.

8. In its report, the Appeals Commission set out the Federation's rules applicable to the process of selecting staff for vacant positions, which are essentially reproduced in considerations 4 and 7 of this judgment. Considering the complainant's contention that the selection process for the five contested positions should have been limited to internal staff only, the Commission specifically referred to Staff Regulation 5.4.1(a) and (d) and noted that the complainant had argued that given the availability of fully qualified internal candidates to fill the positions, it was unlawful for the Federation to have advertised them internally as well as externally at the same time. The Commission also noted the Federation's response that the complainant's interpretation of the provisions was incorrect because it (the Federation) "has full discretion to decide whether to limit recruitment to internal candidates or extend it to external candidates as well". It further noted the Federation's argument that internal recruitment is an option, but not a requirement for the Federation to choose in its discretion and that in practice most job openings are listed for both internal and external recruitment, even where a strong internal candidate has already been

identified. The Federation's stated view was that this approach to the interpretation of the provisions is intended "to ensure a robust and fair competitive process that results in the appointment of the most talented, qualified and suitable candidate for each position". These submissions however misapprehend the purport of Staff Regulation 5.4.1(a) and (d) but in error the Appeals Commission essentially accepted them.

9. The Appeals Commission cited, in particular, the general provision contained in Staff Regulation 5.1.2 that the selection amongst applicants to any post is based on competence for that post (including, but not limited to, qualifications, experience, skills and values), integrity and devotion to the cause served by the Federation. The Commission highlighted the last sentence in that provision that "[i]n cases of equal competencies amongst candidates for a [p]ost, diversity will be taken into account". The Commission then concluded, in error, that although Staff Regulation 5.4.1(a) permits competition for positions to be limited to internal staff when the relevant skills, experience and professional qualifications for the post are likely to be available amongst current Federation staff, there is no requirement that it has to do so. The Commission also concluded that, moreover, even where an internal and an external candidate are considered equally competent, the deciding factor in the applicable rules is that of diversity; there is no stated preference for internal candidates. This, according to the Commission, follows inasmuch as the primary consideration in selection is to ensure that there is a sufficient pool of qualified and suitable candidates which normally entails both internal and external recruitment (unless a strong internal candidate is identified) which is also reflected in the Federation's consistent practice.

10. The Appeals Commission's interpretation mistakenly does not recognize that notwithstanding the general principle for selection stated, for example, in Staff Rules 5.1 and 5.2, as well as in Staff Regulation 5.1.2, the provision for internal advertisement only in Staff Regulation 5.4.1(a) was a specific one that intended to give priority to internal staff in order to enhance their career prospectives and advancement in the Federation, which the Commission's interpretation

in effect nullifies. It is notable that Staff Regulations 5.4.1(b) and (c) also provide for internal advertisement only in specific instances. External advertisement of vacant positions may only be done pursuant to Staff Regulation 5.4.1(d). Under its provision, vacant positions may be advertised externally, only when the position requires technical skills, experience or professional qualifications are unlikely to be available among current Federation staff, or when a different skill set and external experience for the post or within the existing team is needed. Outside of these circumstances, the Federation's rules do not permit external recruitment. The Federation, who is required by the case law, stated, for example, in consideration 20 of Judgment 3601, to prove that the procedure it had put in place was duly followed, has not shown that it advertised the subject positions because the requirements in Staff Regulation 5.4.1(d) existed at the material time.

11. Based on the foregoing, the complainant's submission that the Federation breached its own rules when it advertised the five subject positions externally (as well as internally) is well founded. The impugned decision wrongly accepted the Appeals Commission's conclusion that the fact that the positions were advertised to external candidates as well was not inconsistent with the Federation's rules or that it unfairly prejudiced the complainant.

12. The Tribunal determines that the complainant's submission, in support of the second ground, that the Appeals Commission (and by extension the Secretary General in the impugned decision) erred by not recognizing that the selection process for the Regional Operations Manager (Lead) COVID-19 for the Africa Region position was particularly tainted by procedural irregularity, is also well founded. The vacancy notice for the position was advertised from 24 April 2020 to 1 May 2020. The complainant applied for the position on 1 May 2020 and took a written test on 7 May 2020. His written test (and those of four other candidates) was assessed by the hiring manager alone. The complainant scored the highest marks on that test. However, before the complainant took his written test, the hiring manager had concluded, based on a preliminary review, that not enough strong candidates had

applied for the position and that it should be reopened in order to attract more qualified candidates. The position was therefore readvertised from 5 May to 12 May 2020, following which six additional candidates were shortlisted and tested. As it transpired, the written tests of the six additional candidates were assessed by a panel of three persons, including the hiring manager. Three persons, all external candidates, who obtained the highest marks in that second round of testing were the ones then interviewed. As the complainant submits, in effect, by changing the composition of the assessment panel in the manner in which it did, which resulted in a differently constituted panel assessing the first and second tests, the Federation breached the principle of equal treatment. The Appeals Commission found that “none of the candidates in the initial batch was under active consideration after the position was readvertised” and “the readvertising started the process over”, however the Tribunal notes that no steps were apparently taken to cancel the first selection process to which the complainant had applied, the complainant took his written test after the position had been readvertised and, as the complainant states, he was not so informed and was not informed that he was not selected. It also seems apparent, that the Federation thereby also breached its duty of care to the complainant.

13. In the fourth 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.

14. The complainant argues in particular that the Appeals Commission violated his rights to a fair hearing and due process when it interviewed the Chair of the selection panel about his non-selection for the position of Disaster Risk Management Coordinator (Pacific), in its procedure underlying that aspect of the case, without giving him an opportunity to be present to test the evidence. He argues that this seriously impaired these rights particularly because the report of the selection panel did not provide any justification for his non-selection

and the Commission found that his performance at the interview for that position, in terms of articulating how he would apply his experience for the role envisaged by that position, was relatively weaker than that of the other candidates interviewed, which conclusion was based solely on the Chair of the selection panel's "*ex post facto* explanation" as to why he was not selected. He also submits that his aforementioned rights were violated when, in relation to his application for the position of Operations Manager for the Asia Pacific Region, the Commission interviewed the first line manager, who had served as a member of the selection panel, without giving him an opportunity to test that evidence, but relied on it to determine that the selection process for that position was not tainted by serious defects. The complainant complains, in particular, that the line manager provided "*ex post facto* rationalization" that deviated from the selection panel's shortlisting criteria in its report. The complainant notes that the Commission referred to the line manager's evidence that the top ten candidates, including the complainant, had been further filtered based on their command of the Bahasa language when this was not stated in the panel's report. He states that, moreover, knowledge of that language was not listed as a requirement, but as "preferred". In relation to the Regional Operations Manager (Lead) COVID-19 for the Africa Region position, the complainant submits that the Appeals Commission violated his aforementioned rights when it interviewed the hiring manager for this position about the selection process without giving him (the complainant) an opportunity to test that evidence.

15. 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.

16. 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. It is obvious from the content of the Appeals Commission’s report that the information sought by the Commission was not of a general nature and that it was relating specifically to the selection procedures 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.

17. As it cannot be said with certainty that the complainant would have been the successful candidate had the selection processes for the subject positions not been flawed, he is not entitled to an award of material damages for the loss of one year’s salary or for loss of opportunity he seeks. He is however 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. He will also be awarded 10,000 Swiss francs in costs.

18. Situations will arise where it is appropriate to set aside the selection process and remit the matter to the Federation for it to conduct new selection competitions for the contested positions. This will however not be done in this case as it seems that no practical purpose will be served by doing so, given, particularly, that the complainant is no longer a staff member at the Federation.

19. The complainant’s claim to be awarded such other redress that 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 9 May 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

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

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER