

In re González-Montes

Judgment 1763

The Administrative Tribunal,

Considering the complaint filed by Mr. Herminio González-Montes against the International Atomic Energy Agency (IAEA) on 14 March 1997 and corrected on 24 March, the Agency's reply of 1 July, the complainant's rejoinder of 7 October 1997 and the IAEA's surrejoinder of 27 January 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, a Spanish citizen who was born in 1941, joined the staff of the IAEA in 1969. At the material time he was employed as a safeguards inspector and head of unit in the Department of Safeguards at grade P.5.

From 16 to 28 May 1994 he carried out an inspection mission to Brazil and Argentina. The Agency supplied him with an airline ticket for which it paid 66,960 Austrian schillings. On 16 January 1995 he submitted a claim to travel costs. The Operations Section of the Division of Budget and Finance (ADBF) pointed out that the flight coupons were apparently unused. On 30 June 1995 he said that he had lost the Agency's ticket and had to buy another at the airport. He produced a ticket dated 13 May 1994 and claimed the cost of it, which was 66,960 schillings. By memoranda of 27 July and 22 August 1995 the Operations Section asked him for proof of payment and on 5 September he submitted a receipt from Iberia, the Spanish airline. The receipt was dated 28 August 1995, not 13 May 1994. It related to a ticket with a serial number that was not the same as the one he had submitted. Moreover the ticket had been issued by the office of Iberia in Vienna, not at the airport.

The IAEA got in touch with Iberia, who said that the ticket dated 13 May 1994 had been given to him on 28 May 1995 and had been refunded a few days later; he had travelled on another ticket, which he had bought on 11 May 1994 for 12,110 schillings.

Upon investigation the Division of Budget and Finance and the Division of Personnel discovered that on three other occasions he had traded in tickets that the IAEA had given him for official travel for cheaper ones and had thus obtained vouchers drawn as "miscellaneous charge orders" (MCOs) which accounted for the difference and which he had used to buy tickets for his own use.

The Director of the Division of Personnel put the matter to the Joint Disciplinary Board on 23 April 1996. In an undated report the Board said that he had wilfully broken the Agency's Travel Rules and described as an "aggravating factor" his submitting "false evidence obtained from the airline". It unanimously recommended dismissing him. By a letter of 5 August 1996 the acting Director of Personnel told him that the Director General did so forthwith, without payment of any termination indemnity, on the grounds of serious misconduct; he would be paid three months' salary in lieu of notice less an amount equivalent to the loss he had caused the Agency to incur.

On 16 August 1996 he appealed to the Joint Appeals Board. In its report of 6 December the Board unanimously recommended rejecting his appeal. By a letter of 16 December 1996, which he is challenging, the Director General upheld the original decision.

B. The complainant admits to breaking the Travel Rules by exchanging business-class tickets intended for official travel for economy tickets and MCOs for his own use. But he says he was convinced that that was a widespread practice which the Administration condoned. Besides, the rules are confusing and available only in an English version. The Agency sought to entrap him. Citing his favourable performance appraisals and personal circumstances as a widower with five children, one of them disabled, he pleads that the penalty and its effects were out of proportion to his "excusable" mistake, which caused the Agency no injury. He pleads discriminatory

treatment.

He submits that the Joint Disciplinary Board and the Joint Appeals Board made several mistakes of fact. Their members were not independent, took at face value libellous statements from Iberia, and rejected his own plea that the airline had tampered with the dates. He alleges procedural flaws. For one thing, the Agency broke Austrian law forbidding the disclosure of personal data. For another, it denied him the help of counsel in the internal proceedings, and for fear of reprisals nobody on the staff was willing to defend him. The Board's report was neither signed nor dated. He charges the Agency with breach of good faith and making him a "scapegoat".

He claims the quashing of the Director General's decisions of 5 August and 16 December 1996 and an award of costs.

C. In its reply the IAEA contends that the complainant's systematic attempts at fraud and submission of trumped-up evidence in the inquiry caused it serious material and moral injury. His grade, seniority and proficiency in the English language do not square with his plea of ignorance of the rules. The punishment was, it submits, proportionate to the offence, and he must bear the consequences of his behaviour for his private life. In disciplinary matters each case must be treated as the circumstances require.

The Agency denies committing any mistakes of fact and asks what purpose the airline might have had in tampering with tickets. In any event he should not have been party to any such practice. There were no procedural flaws. There was nothing unlawful about the IAEA's seeking information from Iberia which the complainant had withheld. The Staff Rules do not allow staff members to be defended before the Joint Disciplinary and Appeals Board by anyone who is not on the staff. The membership of both bodies was in line with the provisions of the Administrative Manual, and the complainant did not object to any of their members until he saw the Appeals Board's recommendation for rejection.

D. In his rejoinder the complainant says that every time he changed tickets the Agency got a "kick-back" worth 20 to 30 per cent of the original cost. He denies systematic fraud: he thought the Administration knew full well what he was doing but turned a blind eye. On 12 June 1996 he withdrew his claim of 30 June 1995 to the refund of 66,960 schillings. He maintains that the punishment was disproportionate and that he was discriminated against. Both the investigation and the internal proceedings were hurried.

Citing the case law, he pleads procedural flaws in the IAEA's going to Iberia behind his back and in its announcing his dismissal to the staff of the Department of Safeguards before telling him. He never refused the Agency information, but had to protect his interests in the event of litigation. It was the Agency that would not let him have his say. The reason why he did not challenge any member of the Appeals Board was that he was loth to hold up the proceedings. As his doctor's certificates show, the Agency's action has seriously impaired his health. Its reckoning of the injury he allegedly caused it is unsound: how could he have harmed it when he never claimed any more than he was entitled to?

E. In its surrejoinder the IAEA denies that it got "kick-backs". He had no "entitlement" to the tickets it supplied, and the Travel Rules make it plain that any savings must be made over to it.

Having given him notice of dismissal by a letter of 12 July 1996 it sent to the address he had given, the defendant assumed that he had already had notice when it made the matter public. He has failed to show any connection between the impugned decisions and the state of his health. The Agency offers to refund any amounts he can show that it wrongfully withheld.

CONSIDERATIONS

1. The complainant has applied for hearings. However, he has had ample opportunity in his written submissions to adduce evidence, to raise all the material issues of law and of fact and to answer the defendant's reply on those issues. The Tribunal is able to rule on his complaint with the material before it. His application for hearings is therefore denied.

2. He has also applied for leave to file further written submissions in reply to the International Atomic Energy Agency's surrejoinder. In the light of its conclusions the Tribunal need not allow that application.

3. The complainant attacks a decision of 16 December 1996 by the Director General of the Agency to accept the

Joint Appeals Board's recommendation to dismiss him. His case was originally referred to the Joint Disciplinary Board (JDB) after an investigation by the Agency, and he appealed to the Appeals Board against the Director General's decision of 5 August 1996 to accept the Disciplinary Board's recommendation of dismissal.

4. From an investigation into his claims to reimbursement for duty travel the Agency discovered that on four separate occasions the complainant had switched the business-class airline ticket provided to him by the Agency for an economy-class ticket and had kept the difference in value for personal use.

5. On each of three occasions - duty travel to the United Kingdom from 28 June to 8 July 1993; to Brazil from 16 June to 4 July 1994; and to Brazil and Argentina from 3 to 20 July 1995 - he exchanged his original ticket for an economy-class ticket, but, after travelling, submitted the original, unused ticket stub as part of his claim to the reimbursement of duty travel expenses.

6. The fourth occasion - duty travel to Brazil and Argentina from 16 to 28 May 1994 - prompted the most serious allegation against the complainant. The complainant submitted in support of his travel claim a copy of the travel agent's flight coupon for his original, unused ticket. During the Agency's investigation in June 1995, he stated that he had not submitted the original ticket because he had misplaced it and, using his credit card, had purchased a replacement at Vienna airport on the day of his outbound flight. He submitted his replacement ticket stubs, dated 13 May 1994, and, when requested for proof of payment, submitted a receipt from the airline, dated 28 August 1995, which refers to yet another, unexplained ticket number. Both the original ticket and the replacement ticket cost 66,960 Austrian schillings, which is the amount that the receipt for the third ticket refers to.

7. The Agency's case is that the complainant did not use any of these tickets. Rather, on 11 May 1994, he purchased for 12,110 schillings an economy-class ticket which he used for his duty travel; he did actually purchase a replacement ticket for 66,960. However, according to the airline's copies of the receipts, that purchase was made on 28 May 1995 (during the investigation the following year) and the complainant obtained a full refund to his credit card on 2 June 1995. The airline concluded that the date on the replacement ticket "had been manipulated".

8. In his pleadings the complainant alleges several procedural flaws and mistakes of fact and submits that the Director General erred in law by imposing a sanction that violates the principle of proportionality. He also submits that the Agency has improperly calculated the deduction from his pay for the loss it suffered.

9. With respect to the alleged procedural flaws, the complainant submits that the Agency's initial investigation violated several rules of procedural fairness, that the Disciplinary Board's report was not valid in form, and finally that because of an entrenched system of "bribery and corruption" the Administration, the Disciplinary Board and the Appeals Board were coerced into recommending dismissal.

10. Several of his pleas may be quickly dismissed. First, the fact that he was refused outside legal representation during the internal hearings was in accordance with Staff Rule 12.01.1.D(6) and did not violate his right to due process: Judgment 995 (*in re Agbo*), under 5.

11. Second, there is no evidence to support his contention that the Agency illegally obtained information from the airline involved, nor is there any support for his allegation that the Agency released confidential personal information to the airline during the investigation.

12. Third, there is no merit to his allegations that the chairman of the Appeals Board was coerced by an alleged sense of "obligation" to the Administration or to the Director General in particular. The evidence does not support these allegations. Likewise, there is no substance to the complainant's claim that the two Boards were improperly constituted. Both were constituted strictly in accordance with the applicable rules and procedures contained in the Agency's Administrative Manual.

13. Fourth, with respect to the complainant's submission that the Disciplinary Board's report is not valid because it is not dated, signed or otherwise authenticated, the "report" is actually a summary record of the Board's meetings. There is no evidence whatsoever to indicate that the record is not an accurate summary of the Board's views, and it was clearly adopted by the Board, as well as the Agency, as representing them. The substance of the summary record clearly indicates the conclusion of the Board. There is thus no irregularity in the form of the report.

14. Finally, the complainant makes several allegations about "kick-backs", bribery and general corruption among the "suppliers of tickets". He states that his actions exposed the corruption and pressured the Administration to

"find a scapegoat". In support of these allegations he relies heavily on an unexplained document that appears to relate to the commission payable to the travel agency for tickets sold. Even if these allegations had some substance, which they do not on the evidence presented, they do not relieve him of fault for fraud committed against the Agency.

15. However, there are two elements of the Boards' procedure that require further consideration. First, the Director of the Division of Personnel (DIR-ADPR) was both the chairman of the Disciplinary Board and the head of the department conducting the initial investigation. That the Director of the Division of Personnel should be chairman of the Board is required by paragraph 13(a) of section 13, Part II, of the Agency's Administrative Manual and does not constitute a procedural flaw, but does give rise to a situation in which there is a grave danger of an actual breach of procedural fairness. That is what in fact occurred. As the chairman of the Disciplinary Board, the Director had to refrain from personal involvement in the investigation. He must not be both judge and policeman. That, however, is what happened on at least one occasion. The incident is noted by the Appeals Board in its report: "Two managers from the airline met with DIR-ADPR and provided some explanations ...". Indeed, the Agency admits the fact that such a meeting took place.

16. Thus it is common ground that the Director of the Division of Personnel not only was involved in the initial investigation, but actually took part in interviewing certain witnesses. The Agency's reply states:

"Finally, on the question of the meeting with Iberia, DIR-ADPR wrote to the airline requesting information concerning the travels of the Complainant under investigation. In reply, DIR-ADPR was informed that an Iberian representative would like to meet with him informally to discuss whether the information required should be given orally or in written form ... DIR-ADPR agreed to such a meeting, which was held on 28 March 1996. The particular circumstances of the Complainant's case were not discussed, other than the best way to transmit to the Agency information relating to the use of tickets the Agency had provided to the Complainant. The Agency indicated its preference for written information. No notes of the informal meeting were taken as it was deemed unnecessary."

17. This constitutes a serious breach of due process. The evidence of the airline's representatives was an absolutely key element in the Agency's case against the complainant since it was essential to the very serious allegation that he had attempted to tamper with the evidence. As chairman of the Joint Disciplinary Board, the Director of the Division of Personnel had a duty to be and to appear to be impartial. He should have scrupulously refrained from collecting evidence from witnesses outside the complainant's presence.

18. In Judgment 999 (*in re Sharma*) the Tribunal dealt with a very similar situation:

"2. On 8 April 1988 the Regional Director wrote to the chairman of the Board questioning some aspects of the Board's report and asking for further inquiry into certain facts.

The chairman of the Board wrote to the Regional Director in reply on 26 April giving further explanation. He referred to a meeting which had been held in the Regional Director's office to clarify points arising out of a written statement by a Mr. Virinder Singh Bisht, whose signature had allegedly been forged. The complainant had not been invited to attend that meeting.

The chairman also reported in his letter in a meeting he had had in the Regional Office with Mr. Praveen Gupta, an agent of Jyoti Chemist who had signed the quotation for the supplies on behalf of his brother, Mr. Promod Gupta. The complainant had not been present at that meeting either."

The Tribunal's conclusion was:

"4. Whoever makes inquiries of the kind that were made in this case must be scrupulous in not taking evidence from one party without the other's knowledge. Whether or not the evidence did work to the complainant's prejudice is irrelevant: it is sufficient that it might have done so, and it is not the likelihood but the risk of prejudice that is fatal. There can be no certainty that justice will be done if evidence is taken in the absence of one of the parties."

19. The complainant also asserts a second serious procedural flaw: the Appeals Board asked for and received a legal opinion from the Director of the Legal Division during the appeal. This too was a violation of due process because that Director had been a member of the Disciplinary Board, whose recommendation was under appeal. The Agency admits that the Director signed a legal opinion that had been prepared at the request of the Appeals Board.

That opinion should not have been given by the Director and should have been rejected by the Appeals Board; the Director simply should not have been involved, in substance or in form, with the Appeals Board's recommendation. A member of the body appealed from may not give legal advice to the body which hears the appeal.

20. In these circumstances it is neither necessary nor desirable for the Tribunal to deal with the complainant's remaining pleas, many of which deal with alleged mistakes of fact on the very issue, i.e. the alteration of the date of the replacement airline ticket, on which the proceedings were flawed. Nor is there any need to determine the appropriateness of the sanction imposed.

21. One final point remains. The Agency wrote to the complainant on 8 May 1997 to inform him that it had deducted 43,766.54 United States dollars - the equivalent of 455,172 schillings from his final pay. He raises several objections to the calculation of that sum. However, they are not receivable because he has not attempted to resolve the matter internally. Indeed, the Agency submits that it "stands ready to review any evidence submitted of travel costs for the duty travel trips in question and, if appropriate, reimburse the Complainant".

22. The Tribunal may, however, confirm that the Agency must take into account insofar as possible, in determining the total sum due to it, the actual expenses incurred by the complainant to be reimbursed under the relevant travel rules.

23. The complainant is entitled to his costs in the amount of \$5,000.

DECISION

For the above reasons,

1. The decision of 5 August 1996 to dismiss the complainant and the one of 16 December 1996 confirming it are set aside.
2. The case is sent back to the IAEA for reconsideration.
3. The complainant is reinstated as from 5 August 1996.
4. The Agency shall pay him 5,000 United States dollars in costs.
5. His other claims are dismissed.

In witness of this judgment, adopted on 15 May 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Seydou Ba, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

Michel Gentot
Seydou Ba
James K. Hugessen

A.B. Gardner