

NINETIETH SESSION

In re Umar (No. 2)

Judgment No. 2038

The Administrative Tribunal,

Considering the second complaint filed by Mr Ijaz Umar against the International Atomic Energy Agency (IAEA) on 7 December 1999 and corrected on 12 January 2000, the IAEA's reply of 15 May, the complainant's rejoinder of 8 August and the Agency's surrejoinder of 24 October 2000;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a citizen of Pakistan who was born in 1943, joined the staff of the Agency in Vienna in 1974. In 1986 he was assigned to the IAEA's Toronto Regional Office. In July 1994 he was transferred back to IAEA headquarters in Vienna and thereafter his work required trips to Canada.

In a memorandum of 3 February 1998 the Head of Internal Audit informed the complainant that the Office of Internal Audit and Evaluation Support was carrying out an overall review of staff travel pertaining to the Toronto Office and that it had conducted an audit of the claims for reimbursement of travel expenses submitted by him between 1992 and 1996. He asked the complainant to clarify certain matters connected with his family's air travel to Vienna, when he changed duty stations in July 1994, and nineteen other travel claims relating to duty travel during the period from 1992 to 1995. As also stated in that memorandum, the Agency had sought information from the relevant airline. Its inquiries had revealed inconsistencies between details supplied by the complainant and information given by the airline. In a memorandum of 5 February 1998 the Head of Internal Audit asked the complainant to clarify discrepancies in other travel claims.

On 13 March the complainant provided the required explanations and documentary evidence. The Office of Internal Audit sent him a copy of its draft investigation report on 23 November, giving him the opportunity to comment on it. He submitted his comments on 25 November and on the 26th the Office sent him a copy of the final report, summarising its findings under four "categories". First, the report stated that in spite of the fact that one of the complainant's sons did not return with the family to Vienna, but flew to Pakistan to continue his schooling, the complainant submitted the stub of his son's unused ticket with his travel claim, leading the Agency to believe that the son had travelled with the family. Prior to leaving Toronto the complainant had converted his son's Toronto-Vienna ticket, paid for by the Agency, into a "miscellaneous charge order", which he later used for purposes other than those recognised by the IAEA. Secondly, the report stated that when he was reassigned to headquarters the complainant received an assignment grant, part of which was paid to him in respect of the son who was not living in Vienna. The complainant did nothing to correct that overpayment. Thirdly, the report referred to duty travel which the complainant had extended for private purposes without declaring his actual itinerary on his travel claim. Lastly, it referred to discrepancies in numerous claims for travel expenses where dates entered by the complainant on travel claim forms conflicted with flight departure dates supplied by the airline. This led in some cases to the complainant gaining in terms of daily subsistence allowance and annual leave.

In early 1999 the Office of Internal Audit investigated another matter which had come to light: the rental subsidy which the IAEA had been paying the complainant since his return from Toronto. On 1 June 1996 he and his family changed apartments in Vienna and on 18 March 1996 the complainant had submitted an application form in order to continue receiving the subsidy for the new address. He attached a "lease" agreement drawn up in March 1996 between himself and a private individual, Mr F., identified as the lessor. The Agency continued to pay the subsidy and he renewed his application for rental subsidy on 8 May 1997 and 22 April 1998. The Office of Internal Audit concluded that the lease in question was not an authentic rental agreement, but rather an agreement to pay back a

loan to Mr F. On 24 February 1999 the Head of Internal Audit sent the complainant a copy of the draft investigation report which was produced as a result of the inquiry. The complainant sent in his comments and an explanation the following day.

By a memorandum of 10 June 1999 the Deputy Director General for Administration referred all the matters regarding the complainant's duty travel and rental subsidy to the Joint Disciplinary Board. In its report of 6 August 1999 the Board found that the complainant had made a substantial financial gain, and estimated the Agency's loss at 209,501.50 Austrian schillings. It recommended dismissing him for misconduct. The complainant wrote to the Chairperson of the Board on 13 August, submitting further comments. The Board reconvened on 1 September to consider those comments but, in an addendum published the same day, stated that the information he had provided did not materially alter its interpretation of the facts or affect the conclusions of the Board. The Director of the Division of Personnel wrote to the complainant on 8 September 1999, notifying him of the Director General's decision, taken under Staff Rule 11.01.2(A), to dismiss him that same day for misconduct. The Director said that the "total damages" incurred by the Agency would be deducted from the complainant's final entitlements, that he would receive three months' pay in lieu of notice but would not receive a termination indemnity. That is the impugned decision.

B. The complainant argues that his dismissal was based on errors of fact and law. It was unfair and tainted with procedural irregularity, thereby violating basic tenets of international employment law as well as his fundamental rights. He holds that his professional conduct was impeccable, and his "misconduct" did not warrant dismissal. The sanction was out of all proportion to his actions. Moreover, he was dismissed without first receiving a reprimand or warning.

He refers to the "difficult time" that his family experienced on their return to Vienna, which constituted mitigating circumstances that the Agency failed to take into account. He denies that he attempted to defraud the Agency. Submitting a ticket stub with his travel claim for his son, who had not returned to Vienna but had gone to Pakistan on a ticket paid for by the complainant, was the result of a mere oversight. His failure to report the overpayment in his assignment grant was also an "understandable oversight". With regard to the matter of an extension of his duty travel for private purposes, he points out that prior to 1995 or 1996 there was no requirement to declare private stopovers. Again the matter in question was the result of an oversight because he had developed the habit of preparing his travel claims in advance of his duty travel and had neglected to amend them afterwards. As for the alleged unjustified payments of daily subsistence allowance, he points out that on some occasions when travelling within Canada he did not claim the amount that he was entitled to.

The complainant claims that the Agency did not pay due regard to the explanations and evidence which he supplied but chose instead to accept diverging information provided by the airline. Thus there was breach of his right to "fair and lawful proceedings". In carrying out its "relentless investigation" the Office of Internal Audit did not acquire its information from reliable sources. It contravened paragraph 5 of section 8, part II, of the IAEA's Administrative Manual dealing with the "Protection of Personnel Confidential Information" in that it has "stored, used and communicated" incorrect information which was gathered from an unreliable source. The Agency denied him an opportunity to make a "full and fair defence". He concludes that because essential facts were overlooked the Director General's decision was flawed.

On the subject of the rental subsidy he submits that although he acted "misguidedly" and in a manner which contravened the standard practice of the Agency with regard to obtaining the subsidy, he nevertheless acted in good faith and his error was excusable. Moreover, he had also offered to repay the sums paid to him by the Agency.

The complainant seeks the quashing of the Director General's decision. He claims reinstatement "with full rights and privileges" from the date of his dismissal or, alternatively, an award of damages. He also claims costs.

C. In its reply the IAEA contends that the complainant set out to defraud the Agency in a deliberate and systematic manner over a period of more than five years, and the Director General was justified in dismissing him. It holds that there was no breach of the principle of proportionality. Because of the nature of his misconduct, the Director General had every reason to follow the recommendations of the Joint Disciplinary Board.

The complainant's submissions to the Tribunal reveal no new facts or legal arguments to refute the documentary evidence produced by the IAEA. For the most part the complainant admits his wrongdoing, and only offers "weak excuses". The Agency contests the complainant's assertion that the information it obtained from the airline

company was illegally obtained. There is no reason for him to cast doubt on that information.

With regard to his son's travel to Pakistan the Agency rejects the complainant's view that there was an oversight. In his travel claim, filled in by hand, he expressly mentioned that his son flew from Toronto to Vienna, which was contrary to the facts. The complainant also knowingly received an overpayment of his assignment grant and his plea that it was the result of an oversight cannot succeed. Moreover, even if the complainant had adopted the habit of preparing his claims before travelling, he should have taken the time to make the necessary rectifications afterwards.

On the subject of the rental subsidy paid in respect of the complainant's apartment in Vienna, it says that he took steps to disguise a loan agreement as a "rental agreement" so that he could claim the subsidy. It came to light that the complainant had entered into two agreements both of which purported to be lease agreements on the same apartment: one was with *Firma G.*, a housing company, quoting a rent of 8,000 schillings, and the second agreement was with Mr F., quoting a rent of 17,750 schillings. The lawful owner of the property appeared to be *Firma G.* The agreement with Mr F. was in fact an agreement to pay back a loan, disguised as a rental agreement. The complainant made a false certification on his claim for a subsidy in 1996, and twice thereafter when he applied annually to continue receiving the subsidy.

D. In his rejoinder the complainant presses his pleas. On the matters regarding his duty travel the complainant denies having had any intention to defraud the Agency.

In his view, throughout the whole proceedings the Agency acted against him, preferring the airline's findings to his own. The Agency thereby breached the principle of his right to be heard. He submits that the airline's records were at variance with the dates shown on car rental slips which he provided as evidence. But that evidence was disregarded by the Agency. In view of the "uncertain" information supplied by the airline it should not have been used against him.

The complainant says that the amount he was paying to Mr F. constituted the "rent" for the apartment. It was by virtue of the agreement entered into with Mr F. that he was able to occupy the apartment.

E. In its surrejoinder the Agency notes that the complainant does not challenge the documentary evidence it submitted with its reply. That evidence revealed that the complainant had submitted false claims to the Agency on numerous occasions. Until the investigation revealed his actions he made no attempt to return the sums he had illicitly received.

CONSIDERATIONS

1. The complainant impugns the decision of the Director General of the International Atomic Energy Agency (IAEA) dated 8 September 1999 to dismiss him for misconduct. He asks that it be quashed and that he be reinstated.

2. The complainant, a Pakistani national born in 1943, joined the IAEA in 1974, at its headquarters in Vienna. In September 1986, he was assigned to the Toronto Regional Office. He was transferred back to Vienna in 1994. In February 1998, as part of an overall review of travel undertaken by the staff of the Toronto Office, the Office of Internal Audit and Evaluation Support reviewed both the complainant's duty travel during the period of his assignment to Toronto and his trips to Canada after his reassignment to Vienna. Several anomalies were found by the Office of Internal Audit and were dealt with in its investigation report under four categories. Additionally, some anomalies were found in the complainant's rental subsidy claims for the period from 1996 to 1999. Pursuant to the final investigation report delivered by the Office of Internal Audit, the case was referred to the Joint Disciplinary Board for consideration of the appropriate disciplinary measures to be imposed. With respect to the complainant's duty travel, its findings were grouped under the same four categories:

(i) On 5 May 1994 the complainant was authorised to travel from Toronto to Vienna with his wife, his three sons and his daughter using pre-paid plane tickets provided by the IAEA. On 4 July 1994 the complainant filed a travel claim in which he stated that he and his five dependants had left Toronto on 29 June and arrived in Vienna on 30 June. He attached the stubs of the air tickets. Before leaving Toronto, the complainant had in fact exchanged the ticket of one of his sons for a "miscellaneous charge order" (MCO) because his son had decided instead to return

to Pakistan. The Joint Disciplinary Board found that the complainant had subsequently used the ticket purchased by the IAEA for purposes other than those authorised - a fact that he had not disclosed on his travel claim. He had therefore made a false certification.

(ii) Part of the assignment grant which the complainant received from the Agency was paid in respect of his son on the mistaken assumption, made on the basis of the completed travel claim referred to above, that he had gone to live in Vienna. The Joint Disciplinary Board found that the complainant had accepted that part of the payment knowing that he was not entitled to it. As part of his travel claim he had attached the stub of his son's ticket which had been converted into an MCO, and had thereby given the impression that it had been used as authorised.

(iii) When still assigned to the Toronto Office, the complainant was authorised to attend a training course in Vienna from 25 April to 6 May 1994. He submitted his travel claim indicating a return journey from Toronto to Vienna. Prior to his departure from Vienna, the complainant had his ticket endorsed and flew to Pakistan, where his father was hospitalised. The Board found that he had failed to record his travel to Pakistan on his travel claim and this failure was contrary to the certification he had made as to his actual itinerary.

(iv) In fourteen cases identified by the Office of Internal Audit the complainant's actual itinerary differed from that given and attested to in his travel claim. The Board found that, given the number of times this had happened, the complainant must have been aware that the travel claims were inaccurate and his actions could therefore be considered "regular abuse of Agency travel".

3. The Joint Disciplinary Board found that the complainant had contravened the rules relevant to duty travel. He had also failed to honour his certification that the travel claim represented his "actual itinerary and [his] actual authorized expenses while on official travel". The Board concluded that the complainant's activities amounted to misconduct.

4. With respect to the rental subsidy claimed by the complainant from 1996 to 1999, the Board found that he had entered into a fictitious lease agreement in relation to an apartment in Vienna. He had submitted it to the IAEA, and failed to disclose his true lease agreement, with the intention of obtaining a rental subsidy from the organisation to which he knew he was not entitled. In the course of so doing he made a false certification on his original claim in 1996 to the effect that the information he had given was correct. He did so again on his two subsequent annual re-applications. The Board found that these actions amounted to misconduct.

5. The Joint Disciplinary Board recommended that the complainant be dismissed and on 8 September 1999 the Director General dismissed him. That is the impugned decision.

6. The complainant has failed to submit any new facts or legal arguments that could refute the overwhelming documentary evidence submitted by the Agency which establishes beyond doubt that the complainant undertook to defraud his employer in a systematic and deliberate manner. Only a brief review is necessary of the various issues raised by the complainant.

Duty travel anomalies

Conversion of a ticket paid for by the IAEA into a miscellaneous charge order and thereafter used for purposes other than those authorised

and

Overpayment of the assignment grant in respect of the complainant's son

7. The complainant states that he converted his son's ticket into a miscellaneous charge order and that he purchased with his own funds a ticket for him to travel to Pakistan. He argues that his failure to mention the fact that his son had actually not travelled to Vienna was but a mere oversight on his part. This is in direct contradiction to the complainant's signed statements attesting to the accuracy of the information given on the travel claim. The complainant received payment on the basis of his statements and made no attempt to rectify the situation. The Joint Disciplinary Board found that the complainant had attached the stubs of all six tickets to his claim, and thereby gave the impression that the ticket had been used as authorised. The IAEA then issued an assignment grant

believing that all five of the complainant's dependants had travelled to Vienna.

8. The complainant was heard by the Joint Disciplinary Board and had every opportunity to present his arguments. The Board clearly did not believe him and based its decision on the evidence before it. In the absence of any new evidence pertaining to this matter, and in the light of the admissions of the complainant, the documentary evidence and the findings of the Board, there is no reason why the Tribunal should now accept the explanations provided by the complainant.

9. The Board found that the financial loss sustained by the organisation was 19,550 Austrian schillings - the cost of the original unused ticket. The portion of the assignment grant relating to the complainant's son was calculated at 33,000 schillings. There is no reason to disturb these findings.

Use of a ticket paid for by the IAEA for purposes other than those authorised

10. Before the Board, the complainant testified that, owing to the sudden severe illness of his father, he had obtained an endorsement on his return ticket from Vienna to Toronto in order to travel to Pakistan. The complainant nevertheless submitted a travel claim without mentioning his detour. He explained to the Board that he had developed the habit of preparing travel claims in advance and due to his "hectic schedule" had overlooked the need for correction. The Board found that the complainant should have recorded his private travel to Pakistan on his travel claim and that his failure to do so was contrary to the certification he made as to his actual itinerary. The complainant places great weight on the fact that during the relevant period nothing required him to declare his private stopovers. Even if true, that does not change the fact that the complainant certified that he had followed a certain itinerary, when in fact he had done otherwise.

Incorrect claims relating to official travel resulting in the unjustified payment of daily subsistence allowance (DSA) and additional annual leave

11. The findings of the Board read as follows:

"The Board finds no reason to doubt the veracity of the information on the flights actually travelled provided by [the airline company] in relation to these fourteen cases. The Board notes that in eight of these [the complainant] does not contest the observations of Internal Audit. In the remaining cases, the Board finds [the complainant's] evidence of car rental agreements to be insufficient evidence one way or the other and bases its findings on the information obtained from [the airline]. The Board noted that, in giving evidence before the Board, [the complainant] continued to deny the strong evidence provided by [the airline].

Accordingly, the Board concludes that in all the cases identified by Internal Audit, [the complainant's] actual itinerary differed from that given in his Travel Claim, contrary to the certifications he made. Given the frequency with which this happened, he must be taken to have been aware that the Travel Claims as submitted were inaccurate and his actions can be characterised as the regular abuse of Agency travel.

The Board concluded that [the complainant] had made incorrect certifications and had thereby gained DSA, determined by Internal Audit to total ATS 14,995, and annual leave to which he was not entitled."

12. The complainant contends that the Board should have at least considered the evidence he submitted at the hearing, namely the car rental receipts. As can be seen above, the Board did in fact consider the receipts, but found them to be "insufficient evidence one way or the other". It is not possible to ascertain from some of the receipts whether or not it was the complainant who actually returned the rented cars. Furthermore, it was quite understandable for the Board to give more weight to the documentation provided by the airline than to the car rental information provided by the complainant. The complainant states that he presented the Board with explanations with respect to the procedures he followed when returning the cars. It was apparently not unusual for him to put the keys in a "drop box" prior to boarding a plane. Only after his flight had departed did the car rental office process the return of the vehicle, thereby causing a later time of return to be shown.

The Board cannot be criticised for having disbelieved the complainant considering the circumstances. In any case, the explanations he provided only serve to indicate that the car rental data was, after all, fairly unreliable. Nothing was presented that would cast any doubts on the reliability or accuracy of the airline's information.

13. In the end, it appears that the complainant does not dispute the fact that the travel claims do not reflect the whole truth about his itinerary in eight instances. In the six other cases, the evidence submitted by the complainant was deemed by the Board to be insufficient to outweigh the evidence from the airline submitted by the IAEA. There is simply no valid reason advanced why the Tribunal should review these findings, which are based on credibility and reliability, made by a body which had every opportunity to assess the value of the complainant's evidence.

Anomalies pertaining to the rental subsidy

14. The Board's findings read as follows:

"The Board noted that [the complainant] had entered into two agreements which purported to be lease agreements in relation to the same property, one with [*Firma G.*] dated 8 March 1995, quoting a rent of approximately ATS 8,000, and a second agreement with [Mr F.] dated 18 March 1996, quoting a rent of ATS 17,750. The agreement with [*Firma G.*] was clearly the true lease agreement. The agreement entered into with [Mr F.], who had no known legal interest in the property but who was described in the document as the owner or lessor, went into full details concerning deposit and rent for the apartment, maintenance and service charges, and damage to the property, and must be characterised as a fabrication. The Board had to conclude that [the complainant] knew that his agreement with [Mr F.] was in the nature of an investment or loan agreement, but took efforts to disguise it as a rental agreement. The Board concluded that he had submitted it, and failed to declare his true lease agreement, with the intention of obtaining a rental subsidy to which he would not otherwise have been entitled.

As to [the complainant's] contention that the matter had been clarified at his own initiative, the Board would note that such clarification as was provided appeared after his request for discontinuation of rental subsidy in relation to the property, and after [the IAEA's] subsequent request that he submit evidence of termination of lease. In any case, such clarification should have been provided by [the complainant] at the time of his original application two and a half years previously. At that time, he had made a false certification on his claim, and had repeated this on his two subsequent annual re-applications."

15. The complainant admits that he acted in a manner which contravened the standard practice of the IAEA. He alleges that he acted in good faith and his error was excusable. The complainant's explanations are simply not supported by the documentation. It shows very clearly that the complainant had fabricated the rental agreement with Mr F. and that he failed to declare to the IAEA his true lease agreement with *Firma G.* with the intention of obtaining a rental subsidy to which he would not have otherwise been entitled. The Board heard the complainant's explanations and did not believe them; its findings were completely reasonable and there is no proper basis on which the Tribunal could interfere with them.

Proportionality of the sanction imposed

16. The applicable principles were enunciated by the Tribunal in Judgment 1828 (*in re Kalla*) delivered on 28 January 1999. Under consideration 12 the Tribunal made it quite clear that in cases of fraud, even if the amount at stake is not large, "an intent to defraud the Organization is a most serious offence. The Organization may expect the highest standards of integrity from its staff; it could not possibly just overlook the fraud; and there was nothing disproportionate about dismissing [the complainant] for the misconduct she had committed."

17. The complainant maintains that he had no intention whatsoever to defraud the IAEA. That assertion is simply incompatible with his actions which reveal a long, systematic and deliberate plan to obtain from his employer funds to which he was not entitled. He has fallen far below the standards of honesty and loyalty which are required of an international civil servant. Dismissal was a wholly proportional punishment.

18. The complaint must accordingly be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

James K. Hugessen

Flerida Romero

Catherine Comtet