

The Administrative Tribunal,

Considering the second complaint filed by Mr J. M.R. against the International Atomic Energy Agency (IAEA) on 18 May 2006, the IAEA's reply of 29 August, the complainant's rejoinder of 18 October 2006 and the Agency's surrejoinder of 23 January 2007;

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

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

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

A. Facts relevant to this case are to be found in Judgment 2604, delivered on 7 February 2007, concerning the complainant's first complaint. Suffice it to recall that the complainant was informed by letter of 14 December 2004 that he was suspended with pay, with immediate effect, pending an investigation by the Office of Internal Oversight Services (OIOS) into a formal complaint filed against him by the Director of the Division of Conference and Document Services on 18 November 2004.

The final investigation report drafted by the OIOS was submitted to the Director of the Division of Personnel on 31 May 2005 who in turn sent it to the complainant on 23 June asking for his comments. The complainant replied on 4 July that he would "accept no charge against [him]". On 25 August 2005 he was informed that the Deputy Director General in charge of the Department of Management, following consideration of the OIOS report, had decided that four of the allegations made against the complainant would be submitted to the Joint Disciplinary Board, namely the allegations that he had engaged in inappropriate and unacceptable behaviour towards certain of his colleagues, he had verbally abused a staff member, he had deliberately made false allegations of misconduct against three staff members and that he had inappropriately used the confidential Performance Review Report of another staff member.

In its report of 10 February 2006 the Joint Disciplinary Board recommended that the complainant be dismissed for serious misconduct. It considered that the fact that the complainant possessed and used the Performance Review Report of another staff member for his own purposes constituted misconduct.

By letter of 1 March 2006 the Acting Director of the Division of Personnel informed the complainant that the Director General had decided to dismiss him for serious misconduct, in accordance with the recommendation of the Joint Disciplinary Board. That is the impugned decision.

B. The complainant contends that the disciplinary measure imposed on him is disproportionate to the objective and subjective circumstances in which the alleged misbehaviour was committed; the impugned decision is consequently illegal because it is tainted with an error of law. With regard to the allegations of misconduct he made against other staff members, he points out that the Joint Disciplinary Board held that it was not in a position to determine whether these allegations were deliberately false; he should have therefore "enjoyed the benefit of the doubt". Moreover, he argues that his statement that the career of a staff member was a "comet like career" cannot be characterised as a deliberate false allegation against the person concerned given that she was promoted from grade G.5 to grade P.3 within three years.

Citing the Tribunal's case law, the complainant submits that since a sanction should be proportionate to the fault, summary dismissal should therefore be imposed only on a staff member whose conduct appears to be incompatible with the performance of his duties. He contends that it cannot be asserted that he was unfit for work as is shown by his positive Performance Review Reports in 2002 and 2003. In addition, he alleges that the IAEA failed to respect its duty to treat its staff members with dignity and avoid causing them undue and unnecessary injury since it did not take the necessary measures to improve the unhealthy working atmosphere in the Division in which he was working.

The complainant asserts that the Director General committed an abuse of power. He draws attention to a number of facts, which show in his view “the administrative shortcomings” of the Division and the “exasperation of [his] hierarchy against him”. He adds that he was not given an opportunity to comment on the allegations made against him in November 2004 and was not given reasons until mid-January 2005 for his suspension which took effect from mid-December 2004. According to him, he was suspended on the basis of allegations that were not finally retained in the decision to dismiss him. He also questions the reasons given to justify his “summary dismissal”. He points out that, according to the report of the Joint Disciplinary Board, to which the impugned decision refers, the misuse of the Performance Review Report of another staff member by the complainant justified a written censure but not a dismissal. Lastly, he alleges that the decision to dismiss him has caused him injury, particularly because the Agency failed to treat him with respect for his dignity and good name.

The complainant asks the Tribunal to set aside the impugned decision and order the IAEA to reinstate him and grant him a permanent appointment as from 1 March 2006 or, in the alternative, to pay him an amount equivalent to his gross salary with “all related indemnities”, including health insurance coverage and contribution to the United Nations Joint Staff Pension Fund, as from 1 March 2006 until the age of retirement. He also claims moral damages and costs.

C. In its reply the IAEA contends that the complaint is not receivable because it concerns a disciplinary measure that was not imposed on the complainant. Indeed, although he was guilty of serious misconduct, which would have justified his summary dismissal in accordance with Staff Regulation 11.01, the Director General accepted the Joint Disciplinary Board’s recommendation that a less severe disciplinary measure be imposed. Thus, in accordance with Staff Regulation 11.01, the complainant received for his dismissal the equivalent of three months’ salary in lieu of notice, which means that he was not summarily dismissed.

The Agency denies that the impugned decision was tainted with a mistake of law or was disproportionate. It argues that the decision was taken pursuant to fair internal proceedings and that all available evidence was taken into consideration. The Joint Disciplinary Board pointed out that a written censure could have been the recommended sanction had the only charge against the complainant been misuse of another staff member’s Performance Review Report. It notes that the complainant does not challenge this finding of misconduct. The Board also held that the complainant, in deliberately making false allegations against other staff members, committed serious misconduct. The IAEA emphasises that the Board’s findings are supported by evidence and are correct in law. It further indicates that although it considered that the complainant had committed acts of serious misconduct, the Board recommended his dismissal and not his summary dismissal. Consequently, in its view, the decision to dismiss the complainant was an appropriate exercise of the Director General’s discretion and was proportionate to the complainant’s misconduct.

According to the IAEA, the complainant either knew that he was making false allegations against other staff members or simply did not care whether these allegations were true or not; in both cases such state of mind amounts to serious misconduct. The Agency stresses that the complainant has not produced any evidence to support his allegations of misconduct against other staff members. With regard to the staff member who was promoted from grade G.5 to grade P.3 within three years, it asserts that she was promoted on merit. It acknowledges that the complainant was qualified to perform his work but the fact that he was found guilty of acts of serious misconduct justified his dismissal.

D. In his rejoinder the complainant reiterates his pleas. He maintains that he was summarily dismissed since it was only at 5.30 p.m. on 3 March that he received the letter of 1 March informing him that “[t]he termination of [his] appointment [would] take effect close of business 3 March 2006”. He also claims that he was subject to “administrative harassment” since he has been left without any possibility of finding employment, without earnings and with no health insurance coverage. In addition, he alleges that the Agency has violated the Universal Declaration of Human Rights.

E. In its surrejoinder the IAEA maintains its position in full.

CONSIDERATIONS

1. The background facts are set out in Judgment 2604. Briefly, the complainant was suspended with pay pending an investigation into a complaint lodged by his Director. The complainant had earlier lodged a complaint

in which he made a claim of harassment against three other staff members. The OIOS conducted an investigation into both complaints, during the course of which the complainant made serious allegations which are at the centre of this matter. Following the investigation, four allegations of misconduct on the part of the complainant were referred to the Joint Disciplinary Board. The four allegations were that:

- (i) the complainant had engaged in inappropriate and unacceptable behaviour towards certain of his colleagues;
- (ii) the complainant had verbally abused a fellow staff member;
- (iii) the complainant deliberately made four false allegations of misconduct against other staff members;
- (iv) the complainant inappropriately used the confidential Performance Review Report of another staff member.

The complainant remained suspended pending the proceedings before the Joint Disciplinary Board.

2. The Board formed the view that allegation (i) was not a matter for the imposition of disciplinary measures, that it could not be satisfied that allegation (ii) was established and that, if taken in isolation, allegation (iv) would warrant only a written censure. With respect to allegation (iii), the Board concluded that three of the four allegations of misconduct made by the complainant against fellow staff members were not substantiated by any evidence or information, were very serious and potentially harmful to the private and professional lives of the persons concerned and, whether made deliberately or with reckless indifference, which it could not determine, constituted serious misconduct. In this last regard the Board stated that, in its view, “reckless indifference to the truth was equivalent to deliberate falsehood”. Concerning the last of the four allegations of misconduct made by the complainant, the Board concluded that “even if false, [it] was not necessarily made deliberately”. In the result, the Board recommended that the complainant be dismissed for serious misconduct. The Director General accepted that recommendation and the complainant’s appointment was terminated with effect from 3 March 2006. That is the impugned decision.

3. The date of the impugned decision is correctly identified in the complaint but the decision is mischaracterised as a summary dismissal. On that basis, the IAEA objects to the receivability of the complaint. That objection must be rejected. The decision is correctly identified and the mischaracterisation is of no consequence. It is clear that the complainant seeks to have the decision to terminate his employment set aside and an order made for his reinstatement or, alternatively, for the payment of salary and other benefits until retirement age, as well as moral damages.

4. Before turning to the complainant’s arguments, it is appropriate to note the nature of three allegations he made against other staff members and upon which the Joint Disciplinary Board based its recommendation. The statements were to the effect that one staff member had had a “comet like career” as a result of a sexual relationship with a senior staff member and that a third staff member had been promoted despite his poor performance because he was blackmailing the other two.

5. The main argument he puts forward is that the disciplinary measure imposed lacks proportionality. In this respect, it may be noted that lack of proportionality is to be treated as an error of law warranting the setting aside of a disciplinary measure even though a decision in that regard is discretionary in nature (see Judgments 203 and 1445). In determining whether disciplinary action is disproportionate to the offence, both objective and subjective features are to be taken into account and, in the case of dismissal, the closest scrutiny is necessary (see Judgment 937).

6. The complainant correctly points out that the statement with respect to his colleague’s “comet like career” cannot be characterised as a deliberate misstatement of fact when regard is had to her advancement from grade G.5 to grade P.3 within three years. Further, he also correctly contends that, in the absence of a finding that the other two statements – to the effect that two staff members were having a sexual relationship and that they were blackmailed by another staff member – upon which the Joint Disciplinary Board based its recommendation were deliberately false, the matter should be approached on the basis that they were not. Additionally, he points out that his Performance Review Reports were favourable and his work has been praised on a number of occasions. Further, the complainant says that he was under considerable stress as a result of his suspension and the earlier mishandling of a proposal to transfer him to another position. These matters are properly to be taken into account.

7. Notwithstanding the matters advanced by the complainant, it appears that the statements to the effect that

two staff members were having a sexual relationship and that they were being blackmailed by a third staff member were made deliberately and without supporting evidence of any kind; they involved very serious allegations which, by their nature, must have caused hurt and distress to the persons concerned. And although it is not correct to equate deliberate falsehood with reckless indifference to the truth in all circumstances, the nature of the allegations may be such that there is little, if any, room for difference in the consequent sanction. The more serious the allegation, the greater is the need for care. In the present case the allegations were indeed serious, and were of a kind which, in the absence of cogent evidence, should never have been made. That being so, there was no error in this case in equating the appropriate sanction for reckless indifference with that for deliberate falsehood. The complainant showed a callous disregard for the feelings of the persons concerned and a lack of judgement that was wholly incompatible with the standards of conduct required of an international civil servant. In the circumstances, these matters do not warrant a finding that the disciplinary action was disproportionate to the conduct in question.

8. Two other arguments are advanced by the complainant in his complaint and are further elaborated in his rejoinder. The first is that the decision to dismiss the complainant was illegal because it originated in a mismanaged proposal to transfer him to another post. He contends that that proposal resulted in an unhealthy work environment and that the IAEA failed to take action to improve it. Consequently, it is put, the decision to dismiss him was illegal. It is true that, following the proposal to transfer the complainant, relations deteriorated between him and his colleagues and supervisor. However, the proposal was abandoned and it is not established that more should have been done thereafter. Accordingly the argument of illegality must be rejected.

9. The second argument of the complainant is that the decision to dismiss him constituted an abuse of power. In this regard he again points out that the matter originated in a proposal to transfer him. Additionally, he makes various criticisms of the fact that some of the matters upon which the original complaint against him and his subsequent suspension were based were not reported at the time they allegedly occurred and were not substantiated by the OIOS investigation. Further, he contends that he had no opportunity to answer those matters and was not informed of the reasons for his suspension for several weeks; that his suspension lasted in excess of 14 months and the matters on which it was originally based were not the matters relied upon for his dismissal; and that, in this context, "there are serious elements that allow [the conclusion] that the impugned decision was vitiated by an abuse of power on the part of the Agency".

10. It was held in Judgment 2604 that there was *prima facie* evidence entitling the Director General to suspend the complainant on the two occasions that suspension was imposed, that proper procedures were observed with respect to the OIOS investigation, that the complainant was clearly informed of the reason for his suspension and that there was no reason to infer bias or any improper purpose in respect of the actions taken. Given those findings, which cannot now be controverted, there is no basis for a conclusion that the impugned decision involved an abuse of power.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Giuseppe Barbagallo

