

## EIGHTY-NINTH SESSION

*In re González-Montes* (No. 2)

Judgment No. 1977

The Administrative Tribunal,

Considering the second complaint filed by Mr Herminio González-Montes against the International Atomic Energy Agency (IAEA) on 9 May 1999 and corrected on 17 June, the IAEA's reply of 29 September 1999, the complainant's rejoinder of 5 January 2000 and the Agency's surrejoinder of 31 March 2000;

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

Having examined the written submissions;

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

A. The complainant, a Spanish citizen who was born in 1941, entered the service of the IAEA in 1969. He was accused of defrauding the Agency on several occasions and was dismissed on grounds of serious misconduct on 5 August 1996. By Judgment 1763 (*in re González-Montes*), delivered on 9 July 1998, the Tribunal set aside that decision due to procedural flaws and sent the case back to the Agency for reconsideration.

By a letter of 6 August 1998, the Acting Director of the Division of Personnel informed the complainant that, in accordance with Judgment 1763, he was reinstated retroactively as from 5 August 1996, but that the Director General had decided to suspend him from duty with pay pending reconsideration of his case. After consulting the Staff Council, the Director General decided on 25 August 1998 to appoint an ad hoc Panel to reconsider the complainant's case. At the same time, revisions were made to the Administrative Manual of the Agency in order to prevent the breaches of due process, which were found by the Tribunal in Judgment 1763, from arising in future.

On 31 August, the Head of the Office of Internal Audit and Evaluation Support (hereinafter IA) requested the complainant's comments on a draft report of the investigation into the alleged faults of which he was accused. On 25 September, the complainant replied that, in his view, the supporting documents for the report had been collected "in an unfair and illegal manner", contrary to several provisions of the Administrative Manual, and that he was not prepared to make any comments in relation to the report as long as it still contained those documents.

The report of the investigation, dated 9 October 1998, found that the complainant had defrauded or attempted to defraud the Agency on several occasions between 1991 and 1995 and that he had made a substantial financial gain therefrom. On 3 November, the Acting Director General transmitted the report to the ad hoc Panel for a recommendation. By a letter of 20 November, the Secretary of the ad hoc Panel informed the complainant that the Panel intended to convene on 1 December and requested him to be present. The complainant sought and obtained a postponement of the date until 22 December, but finally informed the Secretary, by a letter of 18 December 1998, that he challenged the legality of the ad hoc Panel and therefore was not prepared to attend the meeting.

In its report of 22 January 1999, the ad hoc Panel recommended the Director General to dismiss the complainant for serious misconduct with immediate effect, without notice or termination indemnity, not to consider him for any future appointment with the Agency and to recover all payments made to which he was not entitled.

By a letter of 5 February 1999, which is the impugned decision, the Director of the Division of Personnel informed the complainant, on behalf of the Director General, that he was dismissed from service with immediate effect for serious misconduct, that no termination indemnity would be paid to him and that the Agency would recover all payments made to which he was not entitled. He would receive three months' pay in lieu of notice. On 11 February, the complainant wrote to the Director General requesting authorisation to appeal directly to the Tribunal without exhausting the internal means of redress. He also requested that the date of his dismissal be postponed until 8 February, the date on which he had received the letter from the Director of Personnel. On 16 February, the

Director of Personnel replied that the Director General agreed to his requests. In a letter dated 11 March, the complainant requested the Director General to grant him the status of suspended employee pending the judgment of the Tribunal. On 22 April 1999, the Director of Personnel informed him that the Director General had rejected this request.

By a letter of 19 April 1999, the Director of Personnel had informed the complainant that, on the basis of the investigation report and the report of the ad hoc Panel, the sums he had wrongly received had been valued at 441,300 Austrian schillings plus 1,321 United States dollars. He invited the complainant to provide any documents on the basis of which this calculation might be adjusted, in the absence of which these amounts would be deducted from the payment of his final entitlements. On 29 April, the complainant replied that he was still not able to make any comments on the evidence presented against him for the same reasons stated in his letters in which he had refused to comment on the report of the investigation and to appear before the ad hoc Panel.

B. The complainant contends that the Agency never intended to reconsider his case and only sought to justify his dismissal.

He submits that the establishment of the ad hoc Panel by the Director General was a "grave procedural error", since the only competent body was the Joint Disciplinary Board. Judgment 1763 did not find the constitution of the Joint Disciplinary Board to be flawed in itself; it did, however, find serious fault with the roles played by both the Director of the Division of Personnel and by the Director of the Legal Division during the investigation and appeal process. The risk of these flaws being repeated had since been eliminated with the transfer of responsibility for conducting investigations to the Office of Internal Audit and Evaluation Support. With regard to the member of the ad hoc Panel who was supposed to have been nominated by the representatives of the staff, the complainant contends that the member had in effect been selected by the Administration to ensure that the initial decision to dismiss him was upheld. Furthermore, Rule 13.03.2 of the Staff Rules states that exceptions to these Rules may be made by the Director General, provided, notably, that any such exception is agreed to by the staff member directly affected. However, the complainant never agreed to the establishment of an ad hoc Panel to replace the Joint Disciplinary Board. He accuses the Director General of abuse of procedural means and abuse of authority by appointing the ad hoc Panel and considers that he was a victim of discrimination.

The complainant contends that any documents collected by the Director of the Division of Personnel during the initial investigation should have been stricken or declared void. The IA was not entitled to request his comments on these documents, but should have initiated his own independent investigation.

He repeats that he could not, under the conditions in which the procedure had been carried out, provide his comments or appear before the ad hoc Panel; however, as he has frequently recalled in his correspondence, he was prepared to cooperate if his objections concerning both the evidence gathered and the ad hoc Panel were taken into account, as there were many issues on which he would have liked to comment. The Administration did not give any reasons for the dismissal of his objections; in his view in doing so it prevented him from defending himself, and therefore it drew mistaken conclusions from the evidence.

The complainant states that he still has not received the payments due for his salary for the period August 1996 to September 1998. He requests that the impugned decision be set aside, that he be reinstated in the service of the Agency and awarded costs, and that his case be sent back to the IAEA for reconsideration.

C. In its reply the Agency submits that it could not entrust the reconsideration of the complainant's case to the Joint Disciplinary Board once again without disregarding Judgment 1763. It affirms that the third member of the ad hoc Panel was indeed selected by the staff representatives. Moreover, the decision to establish the Panel was taken on the basis of Rule 10.02.2 and paragraph 2 of section 13, part II of the Administrative Manual. It did not therefore constitute an exception and Rule 13.03.2 was not applicable. Finally, halting the work of the Panel while awaiting the complainant's possible comments would only have delayed the reconsideration of his case.

The Agency observes that Judgment 1763 at no point has criticised the evidence collected and that the IA has verified its authenticity and reliability. There was therefore no reason not to take it into account. According to the Agency, the complainant had the opportunity to make comments both during the investigation and before the ad hoc Panel. He could have done so without prejudice to his right to challenge their legality before the Tribunal, but he refused to do so and cannot use that as a reason for challenging the decision. Moreover, the reasons for which his objections had been dismissed were known to him.

Finally, on the question of the payment of the salary due to him, the Agency argues that time was needed to settle the complainant's situation regarding the United Nations Joint Staff Pension Fund.

D. In his rejoinder the complainant accuses the Administration of having exerted pressure to influence the choice of the member of the ad hoc Panel representing the staff. The Agency was mistaken in its reply that the establishment of an ad hoc Panel was within the rights conferred upon the Director General, as the provisions which it cites are not applicable in cases where an appropriate body already exists. He reaffirms that he wished to make comments and expresses doubts that a reply to his objections would have greatly delayed the procedure. Finally, he denies having received a satisfactory explanation of the reasons why his objections had been dismissed.

With regard to the non-payment of the amounts due pursuant to Judgment 1763, the complainant accuses the IAEA of bad faith.

E. In its surrejoinder the Agency denies having exerted pressure to change the composition of the ad hoc Panel. It accuses the complainant of adopting dilatory tactics in order to extend his period of leave with pay for as long as possible, knowing that his dismissal was inevitable in view of the serious nature of the offences he had committed.

The IAEA reports that it was informed by the complainant, by a letter of 23 March 2000, of the manner in which he wished to receive the amounts still due and that their payment was being processed.

## CONSIDERATIONS

1. In Judgment 1763 the Tribunal set aside a decision of the IAEA Director General to dismiss the complainant for serious misconduct. As can be seen from that judgment, the decision was based upon the Tribunal's view that two serious procedural errors had been committed by the Agency, namely:

(a) that the Director of the Division of Personnel who had been directly involved in the investigation of the allegations of misconduct against the complainant, had then sat as Chairman of the Joint Disciplinary Board which considered the evidence so obtained and recommended dismissal; and

(b) the Director of the Legal Division, who had been a member of the Joint Disciplinary Board, subsequently gave legal advice concerning the case to the Joint Appeals Board which was hearing the complainant's appeal against the decision to dismiss him.

The Tribunal found that the complainant had not proved any of the other allegations which he had made in support of his attack upon the impugned decision. It returned the matter to the Agency for reconsideration.

2. This case is the sequel to that judgment. Upon receipt of the remit ordered by the Tribunal, the Agency reinstated the complainant, suspended him indefinitely with pay, and initiated a new investigation, which was carried out this time, not by the Division of Personnel, but by the IA. The Director General also appointed an ad hoc Panel to fill the role previously played by the Joint Disciplinary Board and to recommend appropriate action to him in respect to the complainant's activities. The results of the investigation were duly communicated to the ad hoc Panel, which after deliberation, recommended to the Director General that the complainant be dismissed for serious misconduct. By decision dated 5 February 1999, communicated to the complainant on 8 February 1999, the Director General decided that the complainant should be dismissed for serious misconduct. The Agency and the complainant agreed to waive the jurisdiction of the Joint Appeals Board so as to allow recourse directly to the Tribunal. It is the decision of 5 February that is under challenge.

3. An unusual feature of this case, the significance of which has apparently escaped the complainant, is that there is no contested issue of fact before the Tribunal. For reasons which will be discussed below, the complainant chose not to respond to the invitation issued to him by the Head of IA to comment upon the latter's draft investigation report or to submit any evidence or information to the IA. He has similarly refused to appear before the ad hoc Panel or to submit any evidence or information to it. In his submissions to the Tribunal, the complainant, while repeatedly asserting that he has facts and evidence to show that both the IA and the ad hoc Panel committed errors of fact and that the Agency has acted in bad faith and has attempted to use him as a "scapegoat" (allegations similar to those raised by the complainant in the proceedings leading to Judgment 1763), he has produced not a shred of evidence to support those assertions. The upshot is that unless the complainant is successful in his attack upon the constitution of, and procedure followed by, the ad hoc Panel, the facts as determined by the IA

investigation and accepted by the ad hoc Panel's conclusions must be taken as established. These facts, very similar to those outlined in Judgment 1763, are that the complainant on several occasions filed claims and received reimbursement for duty travel in business class while he had in fact travelled in economy class, pocketing the difference. The claims were supported by business class flight coupons which had been obtained by the complainant, but which in fact had never been used, and on at least one occasion, by falsified flight coupons. There is no evidence to support the complainant's contention that this fraud was condoned or approved by the Agency and the complainant's elaborate attempts at concealment make such contention, in any event, wholly incredible. Similarly, his suggestion that his fraudulent practice was widespread amongst other Agency personnel, which is likewise not supported by any evidence at all, is wholly irrelevant: even if all the Agency's officers had been defrauding it in the same manner as the complainant, that would constitute no excuse for him. Where several persons commit the same crime, the guilt of one is not lessened by that of the others.

4. In these circumstances, the complainant's request for a hearing is manifestly unjustified. The complainant has offered no evidence at any stage of the proceedings against him, therefore, such a hearing could not possibly add anything to the record before the Tribunal.

5. The complainant's arguments, though submitted repeatedly and at great length, may be quickly summarized and examined. He claims that the evidence considered by the IA had been collected in an unfair and illegal manner; he attacks both the constitution and the composition of the ad hoc Panel; he claims that the ad hoc Panel failed to give adequate, or indeed, any reasons for a critical part of its recommendation and he says that, in any event, the penalty imposed was disproportionate to the offence.

6. It is the complainant's opinion that the evidence submitted to the IA had been illegally and unfairly obtained, a fact which, in his eyes, justified his refusal to submit any of his own evidence to the IA investigation. He argues that because the Tribunal found in Judgment 1763 that the Director of the Division of Personnel should not have both collected evidence at the investigation stage and sat as Chairman of the Joint Disciplinary Board at the deliberative stage, the consequence must be that any evidence collected in that flawed process must be forever tainted; since the IA investigation report was based on much the same evidence as had gone into the report by the Division of Personnel two years earlier, the IA report is itself fundamentally flawed. The complainant is wrong. Judgment 1763 did not find that the investigation process was itself flawed but made it clear that the manner in which it had been carried out in part by a person who was also Chairman of the Joint Disciplinary Board vitiated the latter's deliberative functions. The evidence itself remained both admissible and relevant and as long as both the IA and the ad hoc Panel offered the complainant full opportunity to comment on and respond to it, which they did, the complainant has no legitimate grounds for objecting thereto.

7. As regards the constitution of the ad hoc Panel, the complainant's contention appears to be that since the Administrative Manual provides for the creation of a Joint Disciplinary Board to deal with such cases, this Board was the only competent body to which the Director General could refer the IA report. The relevant parts of Staff Rule 10.02.2 read as follows:

"(A) The Director General shall establish one or more Personnel Advisory Panels with the object of advising him in matters relating to:

...

(4) The imposition of disciplinary measures;

...

(B) The members of the Personnel Advisory Panels shall be appointed by the Director General after consultation with the Staff Council ..."

This text is broad enough to allow the Director General to create an additional Personnel Advisory Panel such as the ad hoc Panel appointed in this case, where it is thought necessary or advisable to do so. The Administrative Manual, at paragraph 2 of section 13, part II confirms this view:

"The joint staff/management bodies, the terms of reference and composition of which are also listed in this Section, were established either under Article X of the Staff Regulations and Staff Rules and other relevant Rules, or by separate decision of the Director General. ... the Director General may, in conformity with any prescribed

procedures, establish additional joint staff/management bodies and abolish, modify the functions, or change the composition of the existing ones."

It was clearly advisable and, in the circumstances, necessary for the Director General to appoint an ad hoc Panel to deal with the complainant's case after it had been remitted to the Agency for reconsideration. The Joint Disciplinary Board which had heard the case in 1996 and decided it in a manner adverse to the complainant could not be expected to sit on the same case a second time. Indeed, if the solution of appointing an ad hoc Panel which was entirely independent of the original Joint Disciplinary Board had not been adopted, the complainant might have had a legitimate ground of complaint; as it is, he has none.

8. The complainant's argument with regard to the composition of the ad hoc Panel is equally without foundation. It is based on the fact that the Staff Council's original suggestion as to an appropriate person to serve on the ad hoc Panel was later changed because of the unavailability of the person suggested. The change was duly approved by the members of the Staff Council. In any event, it is clear from the text of Rule 10.02.2 quoted above, that the role of the Staff Council in the appointment of members of Personnel Advisory Panels is simply that of consultation and not that of appointment. The evidence is clear that such consultation did take place in the present case.

9. The complainant asserts that the ad hoc Panel failed to give reasons for its opinion because it did not give a reasoned reply to his assertion that it had been improperly constituted. The argument is ill conceived. The obligation of a disciplinary body to give reasons for its opinions is limited to the disciplinary matters remitted to it. The reason is so that the person subjected to a disciplinary measure may know why a penalty is being imposed upon him and may, if he thinks appropriate, appeal against the decision. But an administrative body, such as the ad hoc Panel, has no power and hence no obligation to decide in any definitive way upon its own remit. Of course, it must listen attentively to any objections that are made to the effect that it is exceeding or is about to exceed its powers and must take a position on such objections by either continuing to act or changing its course of action. But in the final analysis, the decision as to whether such a body is acting within its powers or beyond them must lie elsewhere and a person in the complainant's position suffers no prejudice from its failure to give reasons for declining to accede to his objections. Where it was obliged to give reasons on the disciplinary question on which its advice was sought the ad hoc Panel did so in a full and thorough manner.

10. The complainant's contention that the penalty of dismissal was disproportionate to the offence is wholly without merit. He defrauded his employer of substantial sums of money in circumstances that left no room for doubt that he both knew what he was doing and knew that it was wrong. When his actions came under suspicion, he falsified documents in an attempt to justify himself. His actions fell far below the standards expected of any employee let alone the high standards required of an international civil servant. The penalty of dismissal was amply warranted.

11. Finally, neither of the complainant's pleas, to the effect that he has not received his full salary for the period between his first and second dismissals and that the Agency's claims against him are exaggerated, can succeed. The first is irreceivable, the complainant not having exhausted his internal means of redress; the second founders on the complainant's failure, noted above, to present any evidence at any stage to refute the Agency's claims.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Seydou Ba

James K. Hugessen

