Registry's translation, the French text alone being authoritative.

EIGHTY-FIFTH SESSION

In re Martínez-García

Judgment 1764

The Administrative Tribunal,

Considering the complaint filed by Mr. Gastón Danubio Martínez- García against the International Atomic Energy Agency (IAEA) on 24 February 1997 and corrected on 22 April, the Agency's reply of 5 August, the complainant's rejoinder of 22 October 1997 and the IAEA's surrejoinder of 5 February 1998;

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 Chilean who was born in 1938, joined the staff of the IAEA in 1973. At the material time he was a safeguards inspector at grade P.4 in the Department of Safeguards at headquarters in Vienna.

On 31 May 1995 the Director of "Operations B" in the Department of Safeguards approved a "travel authorization" form for him to go on mission to Brazil and Argentina from 9 June to 3 July 1995. The same day the Division of Personnel authorised him to take home leave in Chile from 10 to 26 July 1995. At his request the Agency paid him on 16 June a lump sum of 47,033 Austrian schillings, the equivalent of three-quarters of the price of economy-class airline tickets for travel from Vienna to Santiago, in Chile, and back.

The Division of Personnel found discrepancies in the documents he had submitted in support of his claim to travel expenses. On 11 September 1995 it asked him for more information. In a memorandum of even date he answered that since he had not stayed long enough in Chile to qualify for home leave he was willing to return the lump sum. On 14 September he did so. After several talks with him the official in charge of his case told the Director of the Division in memoranda of 19 and 31 October that she believed he had tried to cheat by combining his mission with home leave without first returning to Vienna though he had pocketed the lump sum made over to him for travel from Vienna to Santiago and back. She said that he had done "the same thing" in 1991.

On 28 November 1995 he saw the Director. He said he had got back to Vienna on 6 July, gone to the office the next day, a Friday - though he had forgotten to clock in or out - and left for Santiago on Tuesday the 11th; he had used the ticket the Agency had given him when he had left on mission on 9 June; in Argentina he had bought tickets for travel from Buenos Aires to Vienna and back, and had used them to fly to Vienna at the end of his mission on 5 and 6 July and back to Buenos Aires on the 11th on home leave; he had also bought tickets to fly from Buenos Aires to Santiago and back on home leave; to fly back to Vienna from Buenos Aires on the 26th he had used the return half of the Agency's ticket. He submitted a letter from the sales manager of Air France in Vienna stating which flights he had taken from Buenos Aires to Vienna on 5 and 6 July and from Vienna to Buenos Aires on the 11th. But the manager of Air France for Austria and Slovakia cast doubt on that in a letter of 16 January 1996 by saying that his office had found no evidence of the complainant's travelling by that airline from Buenos Aires to Vienna at the alleged dates.

The Director of Personnel put the matter to the Joint Disciplinary Board on 26 January 1996. In an undated report the Board held that the complainant had wilfully broken the provisions of the Staff Rules on home leave and the Travel Rules; it saw the submission of "false evidence obtained from the airline" as an "aggravating factor" and recommended dismissing him. By a letter of 12 July 1996 the Director informed him that the Director General was dismissing him forthwith for serious misconduct, without any terminal entitlements but with payment of three months' salary in lieu of notice less an amount equivalent to the losses he had caused the Agency to incur.

On 24 July 1996 he appealed to the Joint Appeals Board. In its report of 31 October the Board unanimously recommended upholding the dismissal for serious misconduct but suggested letting him resign as at the date of dismissal. But by a letter of 27 November 1996, which he is impugning, the Director General upheld his original decision.

B. The complainant puts forward two pleas: procedural flaws and a mistake of law.

At no point in the disciplinary proceedings did the Agency tell him what the penalty might be. The Joint Disciplinary Board recommended dismissal on the strength of facts other than those that had prompted the proceedings. The suggestion that he had done "the same thing" in 1991 is mistaken: until 1995 nobody might claim payment of a lump sum instead of airline tickets for home leave. The Board neither dated nor signed its report.

The charge was that, out of 189 missions in a 23-year career, for two he had got his entitlements twice over, and the amounts were tiny anyway. Dismissal was a disproportionate punishment. The Agency did not give full weight to such mitigating circumstances as his fine record of service, which indeed accounted for the decision not to suspend him from duty and his supervisor's recommendation for renewing his contract even *pendente lite*. The overlapping of travel entitlements is rife at the Agency anyway. He was discriminated against: nearly everyone who does what he did gets off without as harsh a penalty as dismissal.

He seeks the quashing of the impugned decision, moral damages and costs.

C. In its reply the IAEA points out that the complainant has owned up to submitting false evidence. It was implausible of him to tell the Joint Appeals Board that he was unaware of the rules and procedures. He has, it submits, been guilty of "consistent cheating" and caused the Agency "serious material and moral injury".

As to the alleged procedural flaws, the Administration made the seriousness of the charges plain from the outset. The conclusions of the officer in charge and the Disciplinary Board were in line with the facts. Staff have since 1985 had the option of taking lump-sum payment instead of tickets. The complainant offers no grounds for questioning the genuineness of the Disciplinary Board's report.

There was no mistake of law. Dismissal is fitting punishment for serious misconduct. The complainant's duties were politically delicate and called for the highest standards of integrity and independence. A good record of service is no excuse for misconduct. There can be no one standard response in matters of discipline: each case is particular.

D. In his rejoinder the complainant denies the charge of "consistent cheating" and maintains that he was not aware of breaking any rules. The impugned decision was so sudden and so harsh as to be tantamount to summary dismissal.

E. In its surrejoinder the Agency presses its pleas and claims.

CONSIDERATIONS

1. The IAEA dismissed the complainant after enquiry into alleged discrepancies in payments it made him for travel in 1991 and 1995.

2. In 1991 he went by air to Buenos Aires. That journey was an official mission and the Agency paid for his ticket. On the form claiming the refund of travel expenses he said he had gone back to Vienna on 15 June 1991, left for Santiago, in Chile, on home leave and returned to Vienna on 5 July. The Agency met the expenses he incurred for the second journey, to Chile, under Staff Rule 7.02.1(A), which is about home leave. In fact, instead of going back to Vienna on 15 June, he had stayed on in South America. So by misrepresentation he got double payment: once for the mission and again for travel on home leave.

3. He did the same thing in 1995. He again said that he had flown back to Vienna after his mission, but in fact he continued his journey on home leave. Again he was paid twice over, although, a few months later, he returned the amount he had had for the travel on home leave. But he has never admitted that he did not go back to Vienna between mission and home leave travel.

4. The complainant committed a serious mistake in the course of the enquiry. He sought and obtained from an

employee of Air France, with obvious intent to mislead the Agency, a letter mis-stating the dates of travel.

5. Though he admits to "a few mistakes, for example in clumsy self-defence", he challenges the impugned decision on procedural and substantive grounds.

6. He pleads three breaches of due process. One was that he was never warned of the penalty he might suffer; another that no-one explained just why he was being dismissed, the Joint Disciplinary Board having recommended dismissal on grounds other than those which had prompted the Agency to bring disciplinary proceedings. The third flaw was that the Board's report got some of the facts wrong and was neither signed nor dated. He sees a further procedural flaw in the part played by the Director of Personnel.

7. The pleas fail. As to the first, although in all fairness an organisation must tell the staff member of the charges against him, it need not go into the detail of the penalties he may be incurring. Besides, the complainant must be deemed to have been familiar with the rules, and they do set out all the penalties, including dismissal. The staff member's right to know and to answer the charges against him does not require that he be told just what the punishment may be if he is found guilty.

8. The second flaw he alleges is that although the Agency's original charge was that he "had utilized his duty travel ticket ... to purchase a ticket for his home leave" the Board amended it in mid-enquiry. The evidence does not bear that out. The material facts and the substance of the charges were at all times made quite plain; and the complainant had ample opportunity of answering them and he did answer the very charges on which he was eventually dismissed.

9. His third plea is that the Board's report bore neither date nor signatures and was wrong on more than one score. He infers that the Board had not "been unanimous on the penalty to be recommended" and that the only plausible explanation for such flaws was the Administration's relentless determination to recommend dismissal to the Director General. Again there are no such flaws. The Board's report is headed "Summary Record" and it is of course a summing up that the Board had obviously approved: what each member thought is set out, three of them being in favour of dismissal and the fourth preferring down-grading.

10. The complainant objects that the Director of Personnel "monopolised" the case. It is true he did chair the Disciplinary Board, though it was he who had questioned the complainant in the enquiry. But what the Director did is just what the Staff Regulations and Rules lay down and there is nothing inherently improper about it: see on that score Judgment 1763 (*in re* González-Montes), also delivered this day. And in this case there is no evidence to suggest that the Director went any further than the rules allowed.

11. The gist of the complainant's pleas on the merits is that the penalty was not condign. For the rule of proportionality see Judgment 1070 (*in re* Couton) under 9.

12. Yet his behaviour cannot be seen as anything but fraud to his employer's cost and warranting severe punishment. And his shifty attempts to cover up his misconduct and mislead the Agency in the enquiry made his offence a great deal worse.

13. He pleads mitigating circumstances: no rule, he says, actually forbade getting paid twice over; the practice was rife in the Agency; and management tacitly or even expressly condoned it. Again he is quite wrong: there is not a shred of evidence to help him on that score. Nor does it lighten his offence one whit that he had a clean slate, or that a recommendation for extending his contract came before the disciplinary proceedings were over, or that he had spent 23 years at the Agency. See Judgment 1271 (*in re* Sánchez-Peral) under 5.

14. There is one last point. He makes out that, at least in 1991, there was no express ban on what he did. Even if that were so, employees of the Agency have a duty under Staff Regulation 1.01 "to regulate their conduct with the interests of the [Agency] only in view", and may not so behave as to harm its good name. There is no need for any express rule against cheating. Common decency, good faith and honest dealing lie at the root of relations between employer and employee. Whoever ventures to ignore that does so at his own peril. The Tribunal is not satisfied that in the circumstances of the case dismissal was either an unfair or a dispropor-tionate penalty.

DECISION

For the above reasons,

The complaint is 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.

(Signed)

Michel Gentot
Seydou Ba
James K. Hugessen

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.