

## NINETIETH SESSION

*In re Makinwa*

**Judgment No. 2009**

The Administrative Tribunal,

Considering the complaint filed by Mr Alexander Oladosu Makinwa against the International Atomic Energy Agency (IAEA) on 6 December 1999 and corrected on 3 January 2000, the IAEA's reply of 10 March, the complainant's rejoinder of 14 April, and the Agency's surrejoinder of 25 May 2000;

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

Having examined the written submissions and disallowed the complainant's application for oral hearings;

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

A. The complainant, a Nigerian national born in 1951, joined the IAEA on 10 August 1981 on a fixed-term contract at grade G.3 as a library clerk in the Division of Scientific and Technical Information. His current contract for a post at grade G.5 expires on 31 August 2004.

At the material time the complainant was paying maintenance for a son born in 1979 who was not living with him. On 5 March 1996 the complainant filed an application with the Floridsdorf District Court of Vienna requesting a reduction in the amount he had to pay. In support of his application he explained that the maintenance payments caused him financial strain and stated, in a Protocol recorded by the Court, that it was necessary for him to pay for fees and travel to attend a university course in England on the European legal system, or he would lose his job. He also stated that he could provide a written statement from his employer confirming this fact.

On 17 April the District Court wrote to the IAEA to ask whether the course was absolutely necessary for the complainant's professional activities, whether it was for private purposes, and whether he would lose his job if he did not take the course. On 11 July the Agency received a similar inquiry from the Federal Ministry of Foreign Affairs of Austria. As a result of these inquiries, on 30 August the Director of the Division of Personnel launched an investigation and on 13 September the Head of the Vienna International Centre Library informed the Director that the university course was a private matter, that there was no connection between the course and the complainant's present position, and that no one had indicated to the complainant that he should take the course. In an internal memorandum of 29 November the Director of Personnel informed the complainant that his false statements to the Court had brought discredit on the Agency and he reminded the complainant of the standard of conduct applicable to international civil servants. On 4 December 1996 the Agency replied to the Court via the Ministry that the course undertaken by the complainant was not required for his work at the IAEA, that he would not lose his job if he did not take it, and that the IAEA was not paying for it.

On 1 October 1997 the Agency received a new inquiry from the District Court via the Ministry. This time it referred to a performance appraisal report submitted to the Court by the complainant which stated that the course he was pursuing was a requirement for his job. This report, dated 17 September 1995, gave the name of the complainant's supervisor as Mr P. Since a copy of the report was not in his file, the Head of the In-Service Administration Unit requested on 20 November 1997 a copy from the complainant, noting at the same time that the supervisor named in the appraisal report had left the Agency in early 1994. On 25 November 1997 the complainant replied that he was "not aware" of the report in question. The Agency responded to the Court via the Ministry on 27 January 1998 that the performance appraisal report in question was "incorrect and ... not an authentic Agency document". On 19 February the Head of the Staff Administration Section interviewed the complainant who denied falsifying a performance appraisal report. However, he admitted to submitting a report that he considered to be his own personal evaluation of his work performance.

On 5 March the Director of Personnel asked the Office of Internal Audit and Evaluation Support (hereinafter IA) to

investigate whether there had been any infringement of the IAEA rules or procedures. The Head of IA submitted a report to the Director of Personnel on 24 July. The report concluded that the complainant had submitted false statements and a falsified document to the Court, that he had not been truthful in responding to the Agency's questions, nor had he attempted to correct his false statements. The Acting Director of Personnel sent this report to the complainant on 6 August 1998 asking for comments. The complainant responded on the same day admitting that he had "made a mistake by sending a wrong document (performance appraisal form) to the court, it was an error of oversight".

On 26 May 1999 the Director of Personnel referred the case to the Deputy Director General for Administration for a decision pursuant to paragraph 4 of Appendix E of Part II, Section 1, of the Administrative Manual. The latter, in turn, referred the matter to the Joint Disciplinary Board whose Alternate Secretary informed the complainant on 25 June of the Board's composition and of his right to be heard. The complainant acknowledged receipt of this information the same day and stated that he did not object to the membership of the Board. He was heard by the Board on 7 July.

On 24 August the Board submitted its report to the Director General. It recommended that the complainant be suspended for two weeks without pay. On 25 November the Acting Director of Personnel informed the complainant that the Director General found a two-week suspension without pay too lenient for the offence committed and had decided instead to suspend the complainant for three months without pay, effective 26 November 1999. That is the impugned decision.

B. The complainant makes four pleas. First, a three-month suspension without pay was unfair, particularly since the Joint Disciplinary Board had recommended only two weeks. He had sent the appraisal report to the District Court by mistake; he thought he had sent his "school registration paper". However, since the appraisal report had been sent back to the IAEA, and not to him, he was unable to correct the error. In addition, the Board did not consider his plea of mistake as a defence; it was biased and influenced by the Administration. Furthermore, it was not just, fair or reasonable for the IAEA to interfere in a private matter that had nothing to do with his contract of employment.

Secondly, he contends that informing him of the suspension so late on the day before it was to take effect was also not fair, just, or reasonable. This gave him such a shock that he had a car accident after leaving the Agency.

Thirdly, the complainant alleges discrimination. He was given additional responsibilities in June 1998 and his supervisor had recommended to the Division of Personnel that his position be upgraded from G.5 to G.6. The refusal to approve the upgrade was motivated by "malice and hatred" on the part of his employer.

Finally, he argues that the Agency is guilty of "malicious defamation". Friends and colleagues who phoned his office were told that he had been suspended. This was private and confidential information that should not have been disclosed to others. He finds fault with the IAEA for cancelling his own and his family's health insurance without notice.

He requests the Tribunal to order the IAEA: to award "general and exemplary damages for the physical and mental pains, defamation and sorrow" caused by the Agency; to repair his car which was damaged in an accident caused by the sudden shock of his suspension; to pay him for the three months he was suspended; to approve upgrading him from grade G.5 to G.6, retroactive to June 1998; and "since [his] reputation is damaged and destroyed" to consider paying his salary until he would have reached retirement at the age of sixty.

C. In its reply the Agency contends that the complainant's suspension was founded on "clear documentary evidence of ... serious misconduct in two instances". In order to substantiate his claim before the District Court for a reduction of maintenance, the complainant intentionally made false statements to it and, in addition, submitted a fabricated document in support of his statement that he would lose his job if he did not attend the course in England. These are very serious acts. Consequently, the Director General was justified in imposing disciplinary measures. Furthermore, in doing so there was no breach of any of the Agency's rules or procedures.

As to his other claims, the complainant only makes allegations but offers no proof. They should accordingly be dismissed.

D. In his rejoinder the complainant contends that he had a right to defend himself against the District Court's

decision fixing the amount of his maintenance payment. The IAEA, through the Ministry of Foreign Affairs, had provided the Court with the information that the course was not related to his job and this should have been the end of the matter. It is a fact that he attends the course in England and his actions have not brought the Agency into disrepute. Furthermore, it is necessary for the Agency to have incurred a loss in order to prove his guilt; but they have admitted that they have not incurred any.

He presses his earlier pleas and adds that his "trial" was conducted under "duress of circumstances" since the Agency waited until just before his contract was to be renewed.

E. In its surrejoinder the IAEA reiterates that the complainant made false statements to a court of law. The Director General therefore "had no choice but to decide to impose a credible and severe disciplinary measure". It reasserts that the Agency's rules and procedures were complied with and that there was no bias or unfair treatment towards the complainant during the proceedings.

## CONSIDERATIONS

1. The complainant is a library clerk in the IAEA at grade G.5. At the material time he was paying monthly maintenance for his son who did not reside with him.

In 1996 he filed an application with the Floridsdorf District Court in Vienna to reduce the amount of maintenance. As recorded by the Court, one of the reasons he gave was that he had to attend a university course in England, otherwise he would lose his job.

The complainant also sent to the District Court a performance appraisal report dated 17 September 1995 in which the name given for the complainant's supervisor was that of a person who had ceased to be a staff member on 26 March 1994. The report stated "LL.B. [bachelor of laws] degree required for this job and an advantage for the post". A copy of this report was not found in the complainant's file.

In April and July 1996 the Agency received letters from the District Court and from the Ministry of Foreign Affairs asking whether the complainant would lose his job if he did not attend the course. Following inquiries, the Head of the Library informed the Director of the Division of Personnel that the university course was a private matter; it had no connection with the complainant's position and no one had indicated that he should take it. The Agency informed the Ministry in a letter of 4 December 1996 that the course was not required for the complainant's job, that he would not lose his job if he did not take it and that the Agency was not paying for it. The Ministry was also informed on 27 January 1998 that the performance appraisal report was "incorrect and ... not an authentic Agency document".

During an interview with the Head of the Staff Administration Section on 19 February 1998 the complainant denied falsifying a performance appraisal report. However, he admitted submitting a report which was a personal evaluation of how he was performing in his job but he did not intend it to be seen as an official Agency performance appraisal report.

Following an investigation, the Head of the Office of Internal Audit and Evaluation Support sent a report to the Director of Personnel on 24 July 1998. The complainant was given an opportunity to respond to the report. The matter was then referred to the Joint Disciplinary Board. The complainant was informed of, and did not object to, the composition of the Board.

In its report of 24 August 1999 the Joint Disciplinary Board concluded that the case of misconduct against the complainant was based on "clear evidence of presentation of [a] falsified document and misrepresentation before the Court in Floridsdorf by [the complainant] who intentionally committed these acts with a view to substantiating his claim in the Court case for reduction of child's allowance". He had, thereby, violated the Rules of Conduct for International Civil Servants as set out in Administrative Manual Part II, Section 17. The Board also noted that "while there could be no mitigating factor, the consistent denial by [the complainant] about presentation of the fabricated [report] could be considered as an aggravating factor". It recommended that he "be given a suspension without salary for two ... weeks as a disciplinary measure befitting his misconduct".

In a letter of 25 November 1999 the Acting Director of the Division of Personnel informed the complainant that the

Director General had concluded that the recommendation appeared too lenient and that he had decided to suspend the complainant for three months without pay, from 26 November 1999 to 25 February 2000. That is the impugned decision.

2. The complainant raises four pleas.

(a) He claims his suspension is unjust. He did say that he could lose his job if he did not attend the course; but he did not say that it was required by his employers, as was later misconstrued. Also, he did not intend to send the performance appraisal report; he thought he had sent a school registration paper which was similar in form and content. He claims that his employers were obliged to make allowances for the fact that he had made a mistake.

He contends that the Joint Disciplinary Board was biased; it was influenced by the Administration which put pressure on it to reach an "unjust verdict". He also objects to the IAEA's interference in his private affairs.

(b) He says it was unfair to suspend him without notice.

(c) He claims he suffered discrimination because he was not upgraded from G.5 to G.6 as recommended by his supervisor, since it was not approved by the Personnel Division.

(d) He claims that the Agency is guilty of "malicious defamation" because three of his friends who rang him at his office were told he had been suspended for three months; this was making a private matter public.

As a result of all of these, he claims that his right to a fair trial was breached, and that he was subjected to "hardship and torture". His own and his family's health was put at risk by the cancellation of his health insurance without notice. His reputation was "maliciously damaged" and because of his suspension he suffered various medical problems. He attributes a car accident to the shock of receiving the suspension letter.

3. The Agency submits that clear documentary evidence of the complainant's serious misconduct was contained in the Protocol recorded by the District Court. He admitted that he had prepared the performance appraisal report himself although he denied that he intended it to be considered as an official report. The Agency contends that the complainant's arguments are not credible.

The IAEA also submits that all the necessary procedures were followed in setting up the Joint Disciplinary Board and the complainant accepted its composition. The Director General is not obliged to accept the Board's recommendations, which are merely advisory.

Concerning the lack of notice of his suspension, the Agency submits that Staff Rule 11.01.2 allows for disciplinary measures to be summarily imposed in instances of serious misconduct.

The allegation that his privacy was violated, when callers to his office were informed that he had been suspended, has not been proved. Even if people who inquired about him were informed that he was away from his office until a specific date, this was in no way defamatory.

As to his claim that his own and his family's health insurance was suspended without prior notice, this information was contained in the notification of suspension.

The Agency submits that the disciplinary measure was the direct result of the complainant's wrongdoing and he has to take full responsibility for his actions.

Other allegations made by the complainant, such as those based on the reasons why he was not upgraded, have not been proved and should be dismissed.

4. The Tribunal is satisfied that the Joint Disciplinary Board was entitled, having weighed the evidence, to draw the conclusions it did. It found that the complainant's explanations were not credible and rejected them. Where doubt does not exist, the question of the benefit of the doubt does not arise. So the complainant cannot succeed on the plea that his employer was bound to accept that he had made a mistake. The Board was fully justified in its findings.

5. There is no substance to his plea that the Board was biased. It was constituted in accordance with the Staff Rules

and the complainant did not object to its composition. It is contradictory to suggest that pressure was put on the Board to recommend a two-week suspension, when the Director General did not in fact accept this recommendation but instead opted for a more severe sanction of three months' suspension.

6. The complainant cannot complain about the Agency becoming concerned in his private domestic affairs since it was he who involved it by submitting a false statement and a falsified document to the Floridsdorf District Court.

7. While Rule 11.01.2 provides what the disciplinary measures may be, the procedures to be followed in the event of reported misconduct are set out in the Administrative Manual in Appendix E of Part II, Section 1. They have been followed by the Agency. Paragraph 11 of those procedures states:

"The decision of the Director General on the implementation of the disciplinary measure ... together with the report of the Joint Disciplinary Board, shall be communicated in writing to the staff member by the Director, Division of Personnel."

There is no provision as to the length of notice which must be provided.

This plea fails.

8. His plea of discrimination because he was not upgraded is completely irrelevant to his suspension.

9. Malicious defamation does not arise since there is no proof that anything untrue was said about the complainant.

10. All of the injuries which he lists as flowing from his suspension are in fact due to his own wrongdoing which caused the suspension. There is no basis on which he could be entitled to damages in respect of any of them.

11. One of the consequences which he lists is that his own and his family's health insurance was cancelled without notice. This is not true. He was notified in the letter of suspension that he might wish to contact the Social Security Unit to make the necessary arrangements for continued coverage.

12. The complainant's claims are dismissed in their entirety.

## 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, Miss Mella Carroll, Vice-President, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

Mella Carroll

Hildegard Rondón de Sansó

Catherine Comtet