NINETY-SIXTH SESSION

Judgment No. 2282

The Administrative Tribunal,

Considering the complaint filed by Mr D. A. against the International Atomic Energy Agency (IAEA) on 13 September 2002 and corrected on 12 December 2002, the Agency's reply of 21 February 2003, the complainant's rejoinder of 13 May and IAEA's surrejoinder of 21 August 2003;

Considering Article II, paragraph 5, 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. The complainant was born in 1943 and has Canadian nationality. He joined the Agency in 1985 as an expert. From 1988 to 2003 he worked as an inspector in the Agency's department of Safeguards, which comprises several divisions, including three Operations Divisions - A, B and C - corresponding to geographical areas. From 1990 to 1995 the complainant was assigned to Division of Operations A and was based at the Tokyo Regional Office. In September 1995 he was transferred to IAEA headquarters in Vienna. He retired in 2003.

In September 1988 the Acting Director of the Division of Safeguards Support Administration in the Department of Safeguards took steps to reduce "excessive use of terminal allowances" in Division of Operations A, particularly in connection with travel "between Tokyo and the Katsuta area in Japan".[(1)] To that end, he submitted a draft memorandum to the Director of the Division of Budget and Finance for approval, proposing *inter alia* the following measures:

"1. A terminal allowance should only be claimed with a change of residential location.

2. For day travel returning to the same location the actual expense of the journey should be claimed providing the necessary receipts.

3. Terminals should not be claimed by both inspectors if transport is shared, or if the State Authority or Operator provide transport [...]."

Having consulted the Director of the Legal Division, who considered that the first three points of the draft memorandum "could be at variance with Travel Rule 4.01", the Director of the Division of Budget and Finance relayed that opinion to the Acting Director of Safeguards Support Administration and, instead of approving the latter's draft memorandum, put forward a different recommendation concerning claims for terminal allowances, which was implemented with effect from 1 January 1989.

At the material time, Rule 4.01 of the Agency's Travel Rules, entitled "Allowance for terminal expenses", read as follows:

"(a) For all official travel other than by car, a staff member shall be paid, subject to paragraph (b), terminal expenses in respect of each end of a particular journey or leg of a journey as shown in the Travel Authorization at a flat rate of US $ 27 [...].

(b) No terminal expenses shall be paid in respect of an intermediate stop:

(i) which is not authorized in the Travel Authorization;

(ii) which does not involve leaving the terminal; or

(iii) which is for less than four hours and is exclusively for the purpose of making an onward connection.

(c) Terminal expenses payable are deemed to cover all expenditure for transportation to and from the airport, or other point of arrival or departure, transfer of baggage and other incidental charges."

By memorandum of 9 December 1993 (hereinafter referred to as "the 1993 directive") the Director of Division of Operations A (who was the former Acting Director of Safeguards Support Administration), informed all inspectors in his division that travel claims were being closely scrutinised by the Division of Budget and Finance and that, in order to maintain strict compliance with the Travel Rules, they were to observe six points that he went on to list. The third point read as follows:

"3. Terminal allowances may be claimed only when an expense has been incurred during travel, such as taxi, bus, etc. from station/airport to hotel and hotel to point of departure. When walking to the hotel or when transportation is provided, terminal allowances may not be claimed [...]."

From December 1993 onwards, all terminal allowances claimed by inspectors in respect of Katsuta were denied. The justification put forward by the Agency was that, since most staff members who travelled to that destination stayed in a hotel located across the street from the railway station, terminal allowances were unwarranted. Claims in respect of other destinations were not affected.

On 2 February 1994 the complainant wrote to the Director of Division of Operations A asking him to reconsider the third point of the 1993 directive. He referred expressly to the latter's previous exchange of memoranda on this subject with the Director of the Division of Budget and Finance, in 1988-89, to support his view that the disputed measure was contrary to Rule 4.01 of the Travel Rules. He received no reply. In July 1999 the Director of Division of Operations A left the Agency.

On 11 July 2000 the complainant claimed six terminal allowances in respect of Katsuta, for journeys undertaken in June and July 2000. Having been informed that his claim had been refused, on 4 January 2001 he asked the Director General to review the decision not to grant him the claimed terminal allowances. On 2 February 2001 his request was granted by the Director General.

The complainant then asked the Deputy Director General for Safeguards to grant him all terminal allowances denied since December 1993, but this further request was rejected on 20 April 2001. The complainant asked the Director General to review that decision. On 28 August 2001 the Director General allowed the payment of all terminal allowances denied within the previous two years, in accordance with Staff Rule 5.01.12(A) governing claims for past entitlements[(2)].

On 21 September the complainant filed an internal appeal against that decision insofar as it did not grant him the terminal allowances denied between December 1993 and May 1998. The Joint Appeals Board considered that there were special circumstances warranting an exception to the Staff Rules under Staff Rule 13.03.2, and that the Director General should therefore allow the appeal. Those special circumstances were based on the Board's finding that the 1993 directive was formulated in the knowledge that it was in contravention of the Staff Rules and was applied for a number of years with the knowledge of the administration". The Board also took into account evidence of a climate of intimidation in Division of Operations A which might have prevented staff from challenging the disputed policy at the appropriate time.

On 20 June 2002 the Director General informed the complainant that he had decided not to follow the Board's recommendation and that the two-year limit on his claims for terminal allowances would therefore be maintained. That is the impugned decision.

B. The complainant points out that the only issue to be resolved is that of the date from which the denied terminal allowances should be paid. He contends that the application of the two-year time limit invoked by the Director General is contrary to the principle of good faith and to Staff Rule 5.01.12(B), which reads:

"Payments or other benefits which a staff member, although not entitled to, has received in good faith, may be reclaimed by the Agency only within two years from the date on which such payment was made or such benefits were granted."

Consequently, a payment received by a staff member in bad faith can be reclaimed indefinitely by the organisation. The complainant argues that the same requirement of good faith should apply to the IAEA: in other words, where the Agency has denied payments in bad faith, the staff member concerned should likewise be able to claim those payments without limit of time. He refers to the Tribunal's case law on the observance of time limits to support his interpretation of the Staff Rules.

The complainant puts forward three arguments to establish that the Agency acted in bad faith. Firstly, the disputed policy of denying all terminal allowances for Katsuta was clearly illegal, and this illegality was acknowledged by the Director General in his decision of 2 February 2001 granting terminal allowances for travel in June and July 2000 which had been denied in November 2000. The complainant adds that the Director of Division of Operations A was necessarily aware of the illegality of the new policy when he introduced it in December 1993, since the opinion issued by the Legal Division on this matter in 1988 had been conveyed to him. Secondly, he submits that an atmosphere of threat and intimidation prevented him and other staff members from challenging the disputed policy in due time, and he produces a statement signed by himself and 14 colleagues certifying that fear of retaliation by the Director of Division of Operations A prevented them from appealing against the denial of their terminal allowance claims. Thirdly, he states that the IAEA may reasonably be assumed to have been aware of the situation prevailing in Division of Operations A, which lasted for more than seven years.

The complainant asks the Tribunal to set aside the Director General's decision of 20 June 2002. He claims all terminal allowances denied him since December 1993, with interest at an annual rate of 8 per cent, and an award of costs.

C. The Agency agrees that the only issue at stake is that of the date from which the allowances should be paid. It denies that it acted in bad faith. It refers to a memorandum of 15 September 1998, cleared by the Director of Division of Operations A, which indicated that no terminal allowances would be paid in respect of Katsuta, although the actual taxi expense for accommodation in hotels far from the railway station would be reimbursed. It also notes that in response to the complainant's request for review of the decision not to pay him terminal allowances claimed in July 2000, the Director General promptly decided to grant his request, and that terminal allowances have since been paid to all inspectors travelling to Katsuta, subject to the two-year time limit provided for in Staff Rule 5.01.12(A).

The Agency rejects the complainant's interpretation of the rules governing the recovery of past entitlements. It submits that Staff Rules 5.01.12(A) and 5.01.12(B) should not be read together, since they are based on different concepts. According to the Agency, Rule 5.01.12(A), which sets a two-year time limit for claims to past entitlements, is based on the concept of establishing certainty in legal relations between the organisation and its staff members, whereas Rule 5.01.12(B) is based on the concept of preventing unjust enrichment.

The Agency also refers to a previous ruling in which the Tribunal upheld a time limit for claims to past entitlements even where the organisation in question had acted in breach of its obligations. It emphasises that the complainant failed to challenge the contested measures for more than six years, and that his failure to appeal cannot be justified by the alleged existence of a climate of threat and intimidation.

D. In his rejoinder the complainant observes that the Agency has not contested the fact that the Director of Division of Operations A knew from the outset that the policy he introduced in 1993 was illegal, nor that a climate of threat and intimidation prevailed in his Division, nor that the Agency was aware of the irregularity for more than seven years.

He maintains his arguments concerning the requirement of good faith and the interpretation to be given to Staff Rules 5.01.12(A) and 5.01.12(B). He submits that the case law cited by the defendant to support the view that time limits should prevail even where an organisation has acted in breach of its obligations is irrelevant, since that case did not involve the principle of good faith, which he considers to be essential to the present dispute.

He also notes that in denying that it acted in bad faith, the Agency referred only to facts which occurred after the period to which his claims relate. Lastly, he submits that the Director General, despite being aware of the illegality of the disputed policy, did not ensure that the Staff Rules were correctly applied until he initiated an internal appeal.

E. In its surrejoinder the Agency maintains its position. It recalls the Joint Appeals Board's finding that the

allegations of an atmosphere of threat and intimidation were dismissed by a number of staff in the complainant's division, and submits that even if such an atmosphere had existed, the complainant ought to have complained about it within the statutory time limit.

It denies that the Director General was aware of any irregularity in the complainant's division and emphasises that as soon as the issue of the denied terminal allowances was brought to his attention, the Director General rectified it. This, the Agency contends, clearly shows an organisation acting in good faith.

CONSIDERATIONS

1. The complainant was at all relevant times a Nuclear Safeguards Inspector in the Department of Safeguards of the defendant Agency. To cut travel expenditure, the complainant's supervisor introduced a new policy, by means of a directive in force from December 1993 to December 2001, whereby no terminal allowance was paid in respect of Katsuta, Japan. Under Rule 4.01 of the Agency's Travel Rules, a terminal allowance was paid at a flat rate without proof of actual disbursement each time an inspector on duty travel passed through a "terminal" at either end of a journey.

2. The reason for the new policy appears to be that in Katsuta the "terminal" was the railway station located just across the street from the hotel where staff normally stayed, with the result that actual terminal expenses were generally zero. Prior to bringing in the new policy, the supervisor in question had proposed similar measures in 1988; the Agency's Legal Division had indicated that such measures were likely to contravene the provisions of the Agency's Travel Rules. The policy was nonetheless implemented a few years later.

3. In July 2000 the complainant claimed six terminal allowances in respect of Katsuta, for journeys undertaken during the previous six weeks. After an initial refusal followed by a request for review, his claims were allowed by the Director General who accepted that the former policy had been wrong. The complainant then claimed all terminal allowances which had been denied him since December 1993, but many of these further claims were rejected as time-barred.

4. In response to a request for review, the Director General allowed the expanded claims but only for the two-year time period immediately prior to his request, i.e. from May 1998, on the basis of Staff Rule 5.01.12(A), which reads:

"No staff member shall be entitled to receive any payments which, although entitled to, he/she has not received, unless he/she claims such payment in writing within two years from the date on which such payment would have become due."

The complainant appealed against that decision insofar as it denied his claims for the period December 1993 to May 1998, totalling 3,348 United States dollars. The Joint Appeals Board considered that special circumstances warranted an exercise by the Director General of his discretionary power to make exceptions to the Staff Rules and it recommended that this be done. The Director General disagreed and decided to maintain the two-year prescription period. That is the impugned decision.

5. The complainant argues that the two-year time limit is inapplicable because the Agency, which knew that the disputed policy was illegal, denied him the terminal allowances and acted in bad faith. He also alleges that a climate of intimidation prevented staff from challenging the policy earlier. He claims all terminal allowances denied since December 1993, plus interest, and costs.

6. The argument that the Agency acted in bad faith because it had received legal advice recommending against the proposed measures can be quickly disposed of. The new policy was either in accord with the applicable rules or it was not (the Tribunal need not express an opinion on this point, which is not in dispute). In either case, any affected staff had the right to appeal its application to them and obtain a ruling on the matter. Bad faith, which is never presumed, cannot be inferred solely from the fact that professional advice on a doubtful point has not been followed. Lawyers are not infallible and if, hypothetically, the advice given in this case had been wrong, the application of the new policy would not have been vitiated simply because an internal legal adviser had mistakenly thought it was contrary to the Staff Rules.

7. There is far more substance to the complainant's second argument. Although the Joint Appeals Board failed to make a clear finding on the point, it considered that it had weight and should not be dismissed out of hand. The following extract from the Board's Report is relevant:

"35. [The appellant] explained in his appeal and when interviewed by the Board that his delay until 2001 in appealing against the 1993 directive was due to a general atmosphere of threats and intimidation, which resulted in him fearing retribution if he took such an action. He stated that incidents of retribution involving other staff took place and that when he broached the subject of terminal allowances with [the Director of Division of Operations A], he was informed that he could oppose the policy and that he might win, but that he would 'pay the price'. He also alleged that his recall to Vienna from the Tokyo Regional Office in 1995 against his preference was such an act of retribution.

36. The Board heard from a range of Agency staff who were employed in [Division of Operations A] during the relevant period. A number of these staff confirmed [the appellant's] allegations of threats and intimidation in the management of the Division, and one corroborated the express statement which [the appellant] alleged was made by [his supervisor]. On the other hand, a number of other staff dismissed any allegations of an atmosphere of threats and intimidation, or the existence of good reason to fear any form of retribution.

37. The Board noted that there was a sufficiently large proportion of those interviewed who confirmed the allegations, to warrant a conclusion that those allegations had a reasonable degree of substance and that, although [the appellant] queried the policy in his memorandum of 2 February 1994, it may have been reasonable for him not to follow-up on this memorandum or to lodge a formal appeal at that time due to fear of reprisal.

38. While concluding, however, that staff could have been afraid to make use of the appeals procedures as a result of perceived intimidation or threat, the Board noted the statement of the Director General in his letter of 28 August 2001 to the effect that 'the appeals procedures under the Staff Rules are designed to address situations such as those described in your letter of 7 June 2001. They provide for a review procedure exactly in cases where administrative decisions are taken in violation of existing rules or are enforced without proper legal basis'. The Board agreed that, by itself, the existence of an atmosphere of threats and intimidation was insufficient reason to have failed to appeal within the applicable time limits. The Board noted, however, that [the appellant] did take steps in initiating the appeals process, by way of his memorandum of 2 February 1994 to [the Director of Division of Operations A], although he did not follow up on this by lodging a formal appeal."

8. In their pleadings before the Tribunal the two parties repeat the same allegations and take the same positions they had taken before the Board. In particular, the complainant alleges that he was threatened with reprisal in the event that he attempted to contest the application of the new policy by way of internal appeal, and that he later suffered such reprisal. He is supported in this allegation by the written statement of a number of his fellow-workers.

9. The Agency, for its part, in much the same way as it appears to have done before the Board, does not formally deny the very serious allegations of threats and intimidation. Nor does it offer any evidence to cast doubt on those allegations. Rather, it limits itself to asserting the same legal argument that it successfully urged upon the Board and repeated in the impugned decision, namely that, even if there had been threats and intimidation of staff who wished to assert their legal rights to bring internal appeals, the proper recourse of such staff was to bring such appeals and obtain their redress in that way.

10. This view is radically wrong. In the first place, based upon the particular state of the pleadings in the matter before it, the Tribunal must view the complainant's unanswered allegations of intimidation and fear of reprisal as having not been denied by the Agency. The latter's response to those allegations being limited to matters of law, the facts alleged must be taken as true.

11. Secondly, the Agency's position is wrong in law. The integrity of the internal appellate process is of fundamental importance to the proper functioning of the international civil service. Like the process before the Tribunal itself, it must be free of any taint of fraud or abuse of power. If mere delay in the completion of an internal appeal is enough to vitiate the process (see Judgments 2072 and 2197), how much more will that be the case where the process is corrupted at its very source by an attempt to keep staff members from exercising their legal rights. The Tribunal asserts unhesitatingly that intimidation or threats of reprisal in such circumstances will be severely sanctioned. Indeed, there is a positive obligation on the part of the administration of every international

organisation to assist staff in the exercise of their recourse and to place no obstacle in their way.

12. Finally, it will be recalled that what is at issue here is a plea of prescription on the part of the Agency, which seeks to take the benefit of the two-year limitation period in the quoted staff rule. But prescription cannot be invoked by a party which has by its own actions prevented the timely exercise of the creditor's recourses. That is what the pleadings reveal to be the case here.

13. The impugned decision cannot stand and the Agency must pay the amount of the disputed terminal allowances, with interest from the date of each claim, and costs in the amount of 1,500 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The Agency is ordered to pay the complainant the sum of 3,348 United States dollars together with interest at 8 per cent per annum calculated from the date of each claim for terminal allowance filed by the complainant.

3. It shall also pay him costs in the amount of 1,500 euros.

In witness of this judgment, adopted on 7 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

1. In November 1994 Katsuta City merged with Nakaminato City to become Hitachi-Naka.

2. Staff Rule 5.01.12(A) reads as follows:

"No staff member shall be entitled to receive any payments which, although entitled to, he/she has not received, unless he/she claims such payment in writing within two years from the date on which such payment would have become due."

Updated by PFR. Approved by CC. Last update: 20 February 2004.