

EIGHTIETH SESSION

In re GILL (No. 2)

Judgment 1479

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Nirmal Gill against the International Atomic Energy Agency (IAEA) on 28 March 1994 and corrected on 14 February 1995, the IAEA's reply of 31 May, the complainant's rejoinder of 12 July and the Agency's surrejoinder of 18 September 1995;

Considering Articles II, paragraphs 5 and 6, and VII 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. Information relevant to this complaint and the complainant's career at the Agency is set out under A in Judgment 1478, also delivered this day, on her first complaint against the IAEA.

Rule 5.01.12(B) of the Agency's Provisional Staff Rules empowers the Agency to reclaim any sum wrongly paid to a staff member provided it does so "within two years from the date" of payment.

In August 1990 the complainant travelled from Vienna, where the Agency has its headquarters, to attend an official meeting at Canberra, in Australia. The Agency advanced her a sum of money to cover its estimate of her travel expenses.

The complainant having resigned in June 1991, the head of the Operations Section of the Agency's Division of Budget and Finance asked her in a letter of 6 November 1991 to pay back 610.27 United States dollars, the amount by which the sum she had declared as the actual expenses of her travel to Canberra and back to Vienna had fallen short of the amount of the advance from the Agency. In the absence of a reply from her the head of the Section again asked her in a letter of 26 April 1993 to pay her debt.

In a letter of 17 November 1993 the head of the Staff Administration Section told the chief of Personnel Administration at the United Nations Industrial Development Organization (UNIDO), where she had since taken up employment, that, the Agency having failed to recover the \$610.27, he would like UNIDO to help.

In a letter dated 24 November 1993 to the Director General of the Agency the complainant observed that the Administration had failed to claim the "disputed payment" in "the following 9-10 months of my employment with IAEA or again, at the time of my final separation in June 1991". She said that the "tone" of the letter of 17 November, which she had seen, "could be described as libellous" and she sought review of the matter. There followed correspondence in which the Agency said, and she denied, that it had given her timely notice of its claim to the money.

In a letter of 13 December 1993 she asked the Director General for leave to put her case directly to the Tribunal, alleging that the purpose of the letter of 17 November had been to damage her reputation and career prospects. By a letter of 29 December 1993 the acting Deputy Director General in charge of Administration told her that the Agency was pressing its claim to payment and that, although her appeal was time-barred, the Director General was waiving the complainant's obligation to go to the Joint Appeals Board.

B. The complainant accuses the Agency of a "deliberate intent to discredit" her and blight her career. Since it took over three years to seek repayment its claim was time-barred. Its letter of 17 November 1993 to UNIDO - her new employer - made her out to be dishonest and, what is worse, was written at a time when the Organization was applying a policy of staff retrenchment. UNIDO was "looking for an excuse to get rid of" her, and the "timing, nature and tone" of the Agency's letter suggest that the real purpose was to give UNIDO that excuse.

She seeks awards of 1 million United States dollars in damages for harm to her reputation, \$1 million in moral

damages, \$1 million in damages for material and professional injury and \$5,000 in costs.

C. In its reply the IAEA submits that the complaint is irreceivable insofar as she has failed to show how the injury she alleges might constitute breach of the terms of her employment. According to the case law the Tribunal is not competent *ratione materiae* to rule on a complaint alleging libel.

In subsidiary argument on the merits the Agency contends that its attempts to recover from the complainant the sum overpaid were lawful and neither impaired her standing at UNIDO nor caused her any other injury. In a telephone conversation with the head of the Staff Administration Section she acknowledged receiving "letters" from him; since the only letters he had ever sent her were the ones seeking recovery within the time limit in Rule 5.01.12, the Agency plainly did give her due notice of its claim.

D. In her rejoinder the complainant charges the IAEA with "lying" about its earlier attempts to claim money from her. She presses her charges of malice and her claims. She further asks the Tribunal to "censure" the Agency for "fabricating evidence".

E. In its surrejoinder the IAEA insists that what she is objecting to is not a challengeable decision. In any event there is no basis in fact or in law for her allegations.

CONSIDERATIONS:

1. The Agency employed the complainant at Vienna from 1 August 1983 until 18 July 1991, when her resignation took effect. In this complaint she is seeking from the Agency damages for injury to her reputation and for material, professional and moral injury, and costs.

2. In August 1990 the Agency sent her to Canberra to serve as a clerk/secretary at a seminar it was holding there. It paid her an advance to meet her travel expenses but required her to file a claim showing the expenses she had actually incurred.

3. The Agency states that on 6 November 1991 the head of the Operations Section of the Division of Budget and Finance wrote to her at an address in Vienna. In his letter he said that a review of the accounts had revealed that the amount of \$610.27 overpaid to her for the duty travel in August 1990 had not been deducted from her final entitlements, and he asked her to refund that amount. She maintains that she never received that letter.

4. The Agency did nothing further about the matter until 26 April 1993, when the head of the Operations Section sent her another letter at the same address stating that it understood her to be working at the United Nations Industrial Development Organization (UNIDO) and saw no reason why she should not pay the sum she owed to the Agency. The complainant denies receiving that letter too.

5. On 17 November 1993 the head of the Staff Administration Section wrote in the following terms to the chief of the Personnel Administration Section of UNIDO:

"We have been attempting to recover an amount of US\$610.27 from former Agency staff member Ms. Nirmal Gill, who is now employed by UNIDO. Our Division of Budget and Finance has written twice to Ms. Gill (copies attached) to no avail.

I should be grateful for any assistance you may be able to provide in enabling us to finalize this matter."

6. In a letter of 24 November to the Director General of the Agency the complainant said that the "tone" of the letter of 17 November "could be described as libellous" and she asked why the "disputed payment" had not been brought to her attention and why no attempt had been made to recover it in the nine or ten months after her return from the mission while she had still been at the Agency, or else when she had resigned.

7. After further correspondence with the Division of Personnel she wrote to the Director General on 13 December 1993 to say that the letter of 17 November 1993 had been "written with the deliberate intent to discredit [her] and to damage [her] prospects". She asked for waiver of her obligation to go through the internal procedure of appeal.

8. By a letter dated 29 December 1993 the acting Deputy Director General answered her on the Director General's behalf:

"... the Agency's claim for re-imburement by you of US\$610.27 stands.

Although your letters of 6 and 13 December 1993 were not submitted within the time limit in Staff Rule 12.01.1(D) and your appeals therefore are time-barred, I wish to advise you that the Director General agrees to waive the jurisdiction of the Joint Appeals Board so that you may, if you so wish, appeal directly to the Administrative Tribunal ..."

She accordingly filed this complaint impugning the decision of 29 December 1993.

9. Rule 5.01.12(B) of the Agency's Provisional Staff Rules 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."

In its letter of 6 November 1991 claiming repayment by the complainant the Agency made no mention of that Rule. What it did say was that it was "attempting to settle all such items prior to the review of the External Auditors" and would appreciate it if she "could refund" the amount. It concluded with an expression of thanks for her "understanding in this matter". It did not explain why the Division of Budget and Finance had taken sixteen months to discover that she had been overpaid for travel expenses. What is more, though it sent its letter to a private address in Vienna, there is no evidence before the Tribunal to indicate what steps it took to ensure that she was actually resident at that address or would eventually receive its letter. And it sent to the same address the reminder of 26 April 1993 referred to in 4 above.

10. The crucial issue is whether the complainant was duly informed of the Agency's claim. To show that she was, the Agency relies on an internal memorandum which the author of the letters of 6 November 1991 and 26 April 1993 - the head of the Operations Section - wrote on 8 December 1993 to the Director of the Division of Personnel. The memorandum says:

"The only evidence that I can submit in respect of the receipt of the earlier letters is the telephone conversation I had with Ms. Gill. In this conversation Ms. Gill acknowledged that she had received letters (plural) from me on this matter. As I have only sent 2 letters to her, one could presume that she had received both of them."

11. The Agency must show that it not only made its claim but also informed the staff member thereof within the time-limit in Rule 5.01.12(B). The memorandum by the author of the letters is inadequate to prove that the Agency duly informed the complainant of its claim and so met the requirements of the Rule. The letter of 6 November 1991 claiming repayment is therefore of no effect in law. By maintaining its claim to reimbursement in its letter of 29 December 1993 - the impugned decision - the Agency misinterpreted Rule 5.01.12(B) in that it had failed in its duty to ensure that the complainant was informed of the claim within the time-limit in the Rule.

12. The Tribunal has often affirmed the principle of good faith by which international organisations are bound and their duty to treat their staff members with consideration and fairness. It has also affirmed - for example in Judgment 946 (in re Fernandez-Caballero) - the staff member's right to be kept informed of any action that may affect his legitimate interests. It is true that in this case the Agency failed to notify its claim to the complainant properly and so to exercise due care in its application of Rule 5.01.12(B). But the complainant, for her part, has failed to show that she has suffered any material or professional injury on that account or such moral injury as would warrant an award of damages. Her claim to damages on those counts must therefore be dismissed. As to her claim in her rejoinder to the censoring of the Agency for "fabricating evidence", it fails because she offers not a shred of proof in support of her allegation.

13. Since the complaint fails in any event on the merits for the reasons set out above there is no need to entertain the Agency's objections to receivability.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas
Mark Fernando
Julio Barberis
A.B. Gardner

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