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

(Application for review)

105th Session **Judgment No. 2736**

The Administrative Tribunal,

Considering the application for review of Judgment 2589 filed by Ms E. M.-C. on 18 July 2007 and corrected on 3 August, the reply of 19 November by the International Atomic Energy Agency (IAEA) and the letter of 7 December 2007 by which the complainant's counsel informed the Registrar of the Tribunal that the complainant did not wish to enter a rejoinder;

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

Having examined the written submissions;

CONSIDERATIONS

1. The complainant, a Polish national, is employed by the International Atomic Energy Agency (IAEA) where, at the material time, she was working as a Data Clerk in the Division of Nuclear Installation Safety.

On 2 August 2005 she received a written censure from the Director General of the Agency, as provided for in Staff Rule 11.01.2(A), for breaches of the confidentiality rules by which she was bound in the exercise of her duties. She was taken to task, firstly, for having improperly given her husband, who is likewise an IAEA staff member, access to two confidential web server accounts and, secondly, for having given someone outside the Agency, Mr M., the highest-level access to a database of information about nuclear events, called "NEWS". These facts had been confirmed by the findings of two investigations carried out by the Office of Internal Oversight Services (OIOS); one of these investigations also concerned accusations that the complainant had harassed a colleague.

By Judgment 2589, delivered on 7 February 2007, the Tribunal dismissed the complaint in which the complainant had sought the quashing of this disciplinary measure and an award of moral damages. The complainant filed an application for the review of that judgment on 18 July 2007.

2. Consistent precedent has it that, pursuant to Article VI of the Statute of the Tribunal, the latter's judgments are "final and without appeal" and carry the authority of *res judicata*. They may therefore be reviewed only in exceptional circumstances and on strictly limited grounds. As stated in Judgments 1178, 1507, 2059 and 2158, the only admissible grounds for review are failure to take account of material facts, a material error involving no exercise of judgement, an omission to rule on a claim, or the discovery of new facts which the complainant was unable to rely on in the original proceedings. Moreover, these pleas must be likely to have a bearing on the outcome of the case. Pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea, on the other hand, afford no grounds for review.

3. In the instant case the complainant submits in support of her application for review that Judgment 2589 is flawed because the Tribunal failed to take account of certain material facts and omitted to rule on one of her claims.

The failure to take account of material facts

4. The complainant contends that six separate facts were disregarded.

5. First, it is submitted that, in holding in consideration 7 of the judgment under review that no general

principle obliges the Agency to make provision for staff members under investigation to be assisted by a staff representative when they are interviewed by the OIOS, the Tribunal did not take account of the "quasi- criminal" quality of the investigation conducted in her case by that service.

The Tribunal is of the opinion that the complainant's submission that the investigation in question was of a quasi-criminal quality owing to its length and to the criminal nature of some of the acts on which it focused must fail. Moreover, the submissions on this point appear to stem from some confusion about the two separate investigations carried out successively by the OIOS; indeed, the above-mentioned interview took place during the second investigation which did not concern the allegations of harassment initially referred for investigation.

At all events this plea regarding the judgment under review cannot be construed as a failure to take account of a material fact. In submitting that the Tribunal ought to have taken the view that she was entitled to be assisted by a staff representative, the complainant is in fact relying on an error of law or a misinterpretation of the facts. However, as was pointed out in consideration 2 above, such pleas are not admissible as grounds for review.

6. Secondly, the complainant submits that the Tribunal did not take account of the fact that she was assaulted by the OIOS investigators during the interview.

But the complainant, who merely stated in the initial proceedings that she was constantly interrupted, badgered and intimidated at the interview, did not give the slightest hint that she had been the victim of any physical violence imputable to these investigators. If that is the gist of her fresh allegations, she cannot reproach the Tribunal with failing to take account of a fact which she had not mentioned before it, especially as this would not be a new fact affording grounds for a review, since the complainant could plainly have relied upon it during the initial proceedings.

Furthermore, with regard to the more general criticism of the conditions in which this interview took place, the Tribunal found in consideration 7 of its judgment that, although the complainant submitted that the OIOS investigations were tainted with "various flaws", this service had "followed a procedure consistent with its terms of reference". By thus dismissing all the contentions concerning these alleged flaws, the Tribunal, which did not have to reply expressly and separately to each of the arguments raised before it, intended to dismiss the allegations – which it did not ignore – relating to the investigators' behaviour during the interview.

7. Thirdly, it is submitted that the Tribunal failed to take account of the fact that the complainant was denied the right to confront her accusers or to challenge witnesses who had provided evidence against her and that she was thus deprived of the opportunity to put forward a proper defence during the disciplinary proceedings.

In this connection the Tribunal did, however, note in consideration 7 of its judgment that "the rules relating to due process, in particular, which must be respected scrupulously during the actual disciplinary proceedings […] do not apply during the investigation of matters brought before an internal auditing body such as the OIOS", and that the precise rules established in the terms of reference of the OIOS had been followed. On this point the judgment thus decided an issue of law, discussion of which would serve no useful purpose in an application for review. As for the actual disciplinary proceedings before the Joint Disciplinary Board, the Tribunal found that they were "not specifically called into question" by the complainant – as indeed she acknowledges in this application, since she justifies her lack of criticism by the fact that it was not in her interests to challenge the Board's opinion which was in her favour. No matter what submissions are now presented by the complainant about those proceedings, the Tribunal therefore certainly did not ignore the facts of the case as put to it when it delivered its judgment.

Lastly, it must be said that, contrary to the view put forward by the complainant, the Tribunal plainly did not mean to hold that international civil servants whose mission calls for particular vigilance should not have the same rights and guarantees in disciplinary matters as other international civil servants. It merely considered that the former had particular duties of confidentiality, a breach of which justified a disciplinary measure.

8. Fourthly, the complainant submits that the Tribunal took no account of the fact that the Joint Disciplinary Board had not made any recommendation with respect to the allegation that she had given her husband unauthorised access to two confidential web server accounts, whereas the Director General had accepted this allegation against her without providing any reasons for his decision.

In this connection it must first be noted that it is clear from the Joint Disciplinary Board's report that this body did

not actually refrain from making a recommendation regarding the allegation in question but, to be precise, issued a recommendation – from which the Director General in fact departed – that it should not give rise to a disciplinary measure.

In consideration 8 of its judgment the Tribunal found that the letter of 2 August 2005 constituting the disputed written censure set out "in a precise albeit concise manner the factual reasons why the Joint Disciplinary Board's recommendations were not followed". Plainly it did not therefore ignore the fact that this measure was not consonant with the said recommendation. Moreover, it considered at that juncture that the disciplinary authority's reasons for its position were adequate.

9. Fifthly, it is submitted that the Tribunal failed to take account of the fact that, even if the complainant had given her husband access to confidential web server accounts, such behaviour would not have constituted misconduct, since it occurred before the entry into force of section 19 of part II of the IAEA's Administrative Manual (on Information Security), which was not issued until 28 March 2003.

But the Tribunal found in consideration 12 that the complainant was in any case bound more generally by "the rules of confidentiality applying to her and to all the staff members of an international organisation whose mission calls for particular vigilance". It therefore considered that, insofar as it had been established that access to at least one of the server accounts in question was restricted, the complainant could not provide access to another user without violating these rules and that this action was sufficient to justify a disciplinary measure. Thus, the circumstance that section 19 of part II of the Administrative Manual entered into force after the acts in question was in any case immaterial in the eyes of the Tribunal.

10. Lastly, the complainant submits that the Tribunal took no account of the fact that, when questioned on the subject by the Chair of the Joint Disciplinary Board, the Director of the Division of Information Technology could not confirm categorically that the account enabling Mr M. to access the NEWS database had been created – as stated by the OIOS – on 10 September 2001.

However, the Tribunal's affirmation, in consideration 13 of the judgment, that the account in question had been created by the complainant on that date was based in particular on the fact that "[i]t [wa]s plain from the findings of the OIOS that the records of the NEWS database show that the complainant started to create user accounts in October 2000 and was the only person to set up such accounts until 29 January 2003". It also noted that "[t]he various explanations provided by the complainant during the investigations conducted by the OIOS", the "conflicting" nature of which it emphasised, made "her subsequent denials hard to believe". The Tribunal therefore considered that it had before it sufficient evidence to regard the disputed fact as being established, and the circumstance that the Director of the Division of Information Technology did not feel able to confirm categorically the date on which Mr M.'s account had been set up was by no means overlooked, but simply did not suffice to shake that conviction.

Moreover, it must be noted that according to the Director's testimony, which is to be found in the file, his lack of absolute certainty as to the precise date on which Mr M.'s account had been set up did not lead him to question whether it had been created by the complainant.

The omission to rule on a claim

11. The complainant submits that the Tribunal did not rule on her contention that her right to privacy had been breached in regard to confidential information concerning the OIOS investigations. She points out in this connection that she had argued that the OIOS had leaked the draft and final report of its initial investigation to third parties.

But this contention cannot be construed as a claim. It was merely a submission – connected with a more general plea based on flaws in the procedure followed by the OIOS during its investigations – presented in support of the complainant's claims for the quashing of the disputed disciplinary measure and for an award of damages.

Furthermore, the Tribunal did indeed rule on all the claims presented to it and, as stated above, omission to rule on a plea – let alone on a mere argument – in any case is not admissible grounds for review.

It must also be pointed out that the judgment under review mentioned in consideration 7 that although the complainant submitted that the OIOS investigations were tainted with "several flaws", this service had "followed a

procedure consistent with its terms of reference". The Tribunal, which – as stated earlier – did not have to reply expressly and separately to each of the arguments raised before it, thus dismissed all the complainant's contentions regarding the validity of those investigations.

12. It follows that the application for review filed by the complainant is devoid of merit in all respects.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 8 May 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Mary G. Gaudron

Patrick Frydman

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.