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

NINETY-SIXTH SESSION

Judgment No. 2281

The Administrative Tribunal,

Considering the complaint filed by Mr F. B. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 18 March 2003, the Agency's reply of 20 June, the complainant's rejoinder of 10 September and Eurocontrol's surrejoinder of 22 October 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, a French national born in 1953, joined the staff of the Agency on 1 March 1993 and currently works as a supervisor at the Central Flow Management Unit (CFMU).

Since the complainant is assigned to shift work, he receives the allowance provided for in Article 7 of Rule of Application No. 29 of the Staff Regulations governing officials of the Agency. According to paragraph f) of that article:

"Any official to whom [...] Rule [No. 29] is applicable and who has been assigned to shift work for 1 year and who, on account of service requirements, is temporarily withdrawn from such work shall retain entitlement to the allowance for a maximum period of 12 months. During this period, the servant shall be entitled to payment of the allowance at the following rates:

- for the first 3 months: 100%

- for the next 3 months: 50%

- for the following 6 months: 25%"

The transitional allowance is aimed at facilitating the transfer of staff engaged on shift work to important tasks which need to be carried out in normal working hours. At the beginning of 2002 the CFMU was finding it difficult to get shift-work staff to switch to normal working hours to assume such tasks. As a solution to the problem, on 9 April the Director of the CFMU proposed, on a provisional basis, that the allowance concerned should be maintained at 100 per cent for longer than three months, but for a period not exceeding one year. The Director of Human Resources expressed his agreement in a memorandum of 25 April. The new terms on which the allowance would be paid were set out in item 7 of the minutes of a meeting held on 23 May, of which the complainant received a copy. On 28 May he filed an internal complaint alleging "direct discrimination in the performance of his duties". He requested the cancellation of item 7 of the minutes and the cancellation of the payment of the transitional allowance, which he deemed to be "illegal" under the new conditions described above.

The case was brought before the Joint Committee for Disputes, which delivered its opinion on 12 November. It recommended dismissing the complaint for "lack of any injurious act and for want of a cause of action". By a memorandum of 13 December 2002, which constitutes the impugned decision, the Director of Human Resources, on behalf of the Director General, informed the complainant that he endorsed the above opinion and that his internal complaint was therefore dismissed.

B. The complainant alleges that the "decision" taken on 25 April 2002 constitutes a breach of the provisions of Article 7(f) of Rule No. 29. He challenges that decision, arguing that the payment of the allowance referred to in that article constitutes "equitable compensation" for the constraints of shift work. For staff members who, owing to service requirements, are temporarily removed from shift work, the allowance was to be paid transitionally at a gradually reduced rate, but by deciding to continue paying them the allowance at 100 per cent beyond the first three months, the Organisation breached the principle of equal treatment. According to the complainant, this decision has given rise to a feeling of injustice among staff members who, like himself, continue to accept the constraints of shift work, though without gaining any particular advantage compared with those no longer subject to such constraints. Thus, the principle of "equal pay for equal work" has been breached.

In addition, the complainant maintains that the Agreement on consultation, conciliation and arbitration procedures between Eurocontrol and the Trade Union Organisations (hereinafter referred to as the "Agreement"), signed on 9 January 1992, was also breached. Since the decision under challenge was a general measure in application of the Staff Regulations, it fell within the scope of that Agreement. Yet it had never been through either the consultation procedure or the conciliation and arbitration procedure required by the Agreement.

The complainant requests that the Tribunal set aside the decisions of 25 April and 13 December 2002, as well as item 7 of the minutes of the meeting of 23 May 2002, and that it cancel all payments made on the basis of the decision under challenge. He also claims 4,000 euros in costs.

C. In its reply the Agency contends that the complaint is irreceivable on the grounds that the complainant has no legitimate personal cause of action; he is challenging a "temporary decision of general application" which does not concern him since he is still doing shift work. For the same reason, it considers the claim for the cancellation of payments made on the basis of the decision under challenge as equally irreceivable. In its opinion, the complainant's only purpose is to "censor" the Administration.

On the merits, it comments that, generally speaking, a complainant pleading a breach of the principle of equal treatment must prove that he is in the same situation in law and in fact as the officials receiving more favourable treatment. In this case, however, the complainant claims nothing for himself but asks for the withdrawal of a temporary benefit granted to colleagues whose situation in fact is different from his own.

Furthermore, the Agency recognises that it did not abide by the provisions of Article 7(f) but maintains that the decision under challenge was taken for the sake of good management: in order to avoid the need for mandatory staff transfers, it had been decided to introduce a temporary adjustment in the provision concerned.

According to the Agency, the Agreement of January 1992 was not applicable in this case, since the decision under challenge did not constitute a measure for which the procedure defined in the Agreement is required. This is shown by the fact that the decision did not adversely affect any other members of staff, including the complainant, and that it was a temporary measure introduced as a matter of urgency pending a complete review of Rule No. 29.

The defendant considers the complaint to be manifestly abusive and seeks an award of costs against the complainant.

D. In his rejoinder the complainant contends that the decision of 25 April and the minutes of the meeting of 23 May 2002 gave rise to unequal treatment and hence constituted acts which adversely affected him. His personal cause of action therefore cannot be questioned. Moreover, the claim which Eurocontrol considers irreceivable is merely the "logical outcome" of his main claim, which is to have the decision under challenge set aside.

According to the complainant, discrimination undoubtedly occurred insofar as persons placed in objectively different situations received the same treatment. He also maintains that the Agreement of January 1992 does not provide for any exception to the obligation of prior consultation and conciliation in the event of a "change in remuneration". He rejects the reasons given by the defendant to show that the Agreement did not apply, pointing out in particular that no amendment to Article 7 has yet been introduced. Lastly, the complainant contends that the Agency has failed to show that his complaint is manifestly abusive, so that there is no reason why he should bear the costs of the proceedings.

E. In its surrejoinder the Agency maintains its position both with regard to receivability and on the merits, and reiterates its claim for costs to be paid by the complainant.

CONSIDERATIONS

1. Rule of Application No. 29 of the Staff Regulations governing officials of the Eurocontrol Agency deals *inter alia* with allowances applicable to staff serving at the CFMU "performing shift work, stand-by duties, and overtime".

The complainant receives the allowance provided for in Article 7 of that Rule. According to paragraph f) of the article, any official who has been "assigned to shift work for 1 year and who, on account of service requirements, is temporarily withdrawn from such work shall retain entitlement to the allowance for a maximum period of 12 months". During that period, the official receives a transitional allowance, payable at the rate of 100 per cent for the first three months, 50 per cent for the next three months and 25 per cent for the following six months.

By a memorandum of 25 April 2002, the Agency temporarily suspended the decreasing scale of the transitional allowance in order to be able to assign staff who had been working on shift work to training duties, amongst others. This decision was announced at a meeting on 23 May and recorded under item 7 of the minutes of that meeting.

2. On 28 May the complainant filed an internal complaint, which was dismissed on behalf of the Director General on 13 December 2002, as recommended by the Joint Committee for Disputes. The latter had concluded that even though the complaint was arguable from a legal point of view as the decision under challenge had in its view no legal basis, it was "irreceivable for lack of any injurious act and for want of a cause of action".

The complainant asks the Tribunal to set aside the decision contained in the memorandum of 25 April 2002; item 7 of the minutes of the meeting of 23 May 2002; the decision rejecting his internal complaint; and all payments of the transitional allowance made on the basis of the challenged decision. He also claims 4,000 euros in costs. In his view, the decision he challenges contravenes the provisions of Article 7(f) of Rule No. 29, the principle of equal treatment and the Framework Agreement concluded with the Trade Union Organisations on 9 January 1992.

The Agency submits that the complaint is irreceivable, on the grounds that the decision he challenges did not adversely affect the complainant and that any overpaid sums cannot be restituted. Subsidiarily, it purports to show that the complaint is unfounded.

3. Allowing the complainant's claims would adversely affect the rights of third parties by depriving them of the benefit conferred on them by the challenged measure and by obliging them to return the overpaid amount. Such claims could be admitted only if the Tribunal gave the third parties concerned an opportunity to voice their opinion. There is no need to do so, however, since it appears that the complaint is irreceivable.

4. (a) The impugned decision dismisses the complainant's internal complaint, which was deemed to be irreceivable for lack of an injurious act and of a cause of action. The complainant denies that he lacks a cause of action since, in his opinion, the decision he challenges gave rise to a breach of the principle of equal treatment.

The Tribunal is of the view that the complainant has no real and present personal cause of action which would justify challenging a measure that in no way applies to him.

(b) Furthermore, the decision under challenge is a general decision - concerning the remuneration of certain officials - which needs to be implemented by means of individual decisions evidenced by "pay slips". But consistent precedent has it that only an individual decision can be challenged by the official concerned, and not the general decision on which that individual decision is based (see, for example, Judgments 1510, under 4, 1786, under 5, 1852, under 3, and the cited case law).

It may be noted that in this case the complainant seeks the withdrawal of a benefit from third parties and not the granting of an equivalent benefit to himself.

The internal complaint was therefore rightly considered to be irreceivable.

5. Consequently, the complaint must be dismissed. The Tribunal does not consider it appropriate for the complainant to pay the Agency's costs.

DECISION

For the above reasons,

The complaint and the Agency's counterclaim are dismissed.

In witness of this judgment, adopted on 19 November 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

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