

NINETY-SEVENTH SESSION

Judgment No. 2346

The Administrative Tribunal,

Considering the complaint filed by Mr C. M. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 9 May 2003, the Agency's reply of 29 August, the complainant's rejoinder of 7 October 2003 and Eurocontrol's surrejoinder of 9 January 2004;

Considering Articles II, paragraph 5, and VII 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 1948, joined the Agency in 1972 as a trainee air traffic controller. In 1994 he was promoted to grade B1 as Sector Supervisor. He worked in the Operations Room of the Upper Area Control Centre (UAC) in Maastricht.

On 4 June 2002 the complainant entered into an altercation with one of his colleagues in the Operations Room. On 20 June he was placed on sick leave by the Centre's Medical Advisor, who issued him a medical certificate on 27 June authorising him to "take leave owing to his interaction" with his work environment. On 15 July the Head of the Operations Division wrote to the complainant that, since his presence in the Operations Room caused disturbances with colleagues, he had decided to have him released from his duties until further notice. He added that he had asked the Medical Service to produce a report on his behaviour, on which his readmission to the Operations Room would depend.

On 27 and 28 July 2002 the complainant reported for duty but was denied access to the Centre. On 1 August he submitted an initial internal complaint to the Director General, stating that he was not sick and that the decision of the Head of the Operations Division amounted to misuse of authority. In a letter dated 2 August, the latter told the complainant that, so long as he was declared "unfit", his shift duties in the Operations Room would be replaced by "normal office duties".

In his report of 4 September, the Head of the Medical Service considered that the complainant was "fit enough" to perform his duties as Sector Supervisor. However, the Head of the Operations Division wrote to the complainant on 9 September stating that, for "safety reasons and in the interest of the service", he would propose that the Director General transfer him. As a result, the complainant was transferred within the Division. The decision of transfer, dated 19 September, informed him that he would be paid an operational support allowance as from 1 October 2002.

Meanwhile, on 10 September, the complainant's radar licence had expired.* On 9 October he asked the Director General to convene an Enquiry Committee. In a second internal complaint, dated 14 October, he stated that his new duties did not match his skills, primarily because they required a valid and updated licence. On 12 November he filed a third internal complaint, in which he requested that the Director General intervene in order "to restore [his] rights [...] as radar controller and supervisor in the Operations Room".

The matter was referred to the Joint Committee for Disputes, which issued an opinion on 20 December 2002 regretting many shortcomings in the procedure. It found in particular that the Agency had not followed an adversarial procedure and pointed out that the reasons given for the decision to transfer the complainant had "changed". The Committee concluded that "in view of the contradictory statements by the parties and the lack of written evidence supporting either position", it was "exceptionally unable to express an opinion on the legal or

factual issues” raised by the case. However, it unanimously recommended that the complainant’s radar licence should be renewed so as to allow him to carry out his new functions in optimum conditions. In a letter of 2 April 2003, which constitutes the impugned decision, the Director of Human Resources, on behalf of the Director General, informed the complainant that he considered that his internal complaints were devoid of merit. He stated that the decision concerned had been taken in the interest of the service and that, in view of the need to ensure the smooth functioning of the Operations Room, the Joint Committee’s recommendation appeared “unrealistic”.

Meanwhile, having reached the age of 55, the complainant had been retired, as of 1 March 2003, in accordance with the provisions of Article 1 of Appendix IV of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre.

B. The complainant argues that, according to the Tribunal’s case law, even though the Director General was entitled to take his decision of 2 April 2003 “in the interest of the service”, he was nevertheless obliged to give reasons, which he failed to do. Such a decision, in his view, constituted misuse of authority. The decision of transfer, he maintains, was simply a disguised disciplinary measure which impaired his dignity. It amounted, moreover, to a downgrading to B2, which, according to Judgment 2027, made it unlawful.

He further submits that he never received any operational support allowance for the period from 1 October 2002 to 28 February 2003, which he now claims.

Lastly, he points out that the loss of his radar licence prevented him from taking up his new duties, so that he was “paid to do nothing”.

The complainant asks that the impugned decision be set aside and claims payment of the operational support allowance and 25,000 euros in damages. Recalling that the tradition at the Agency is to offer air traffic controllers reaching retirement age a chance to continue working in the Operations Room for a further two years, he also wants his radar licence to be renewed. He claims 3,500 euros in costs.

C. In its reply the Agency maintains that the claim for payment of the operational support allowance is irreceivable because internal appeal procedures were not exhausted. It recognises, nevertheless, that the complainant was entitled to the allowance and points out that, since the filing of his complaint, the administrative error has been made good and the complainant has been paid the sums due, plus interest at the rate of 8 per cent per year. Furthermore, according to Eurocontrol, while some air traffic controllers can be kept on after the age of 55, it was up to the complainant to request the extension. He had not done so and the defendant therefore considers that his request for his radar licence to be renewed is also irreceivable.

On the merits, the Agency recalls that air traffic controllers carry major responsibilities and that the Control Centre authorities are therefore obliged to maintain a peaceful working environment in the Operations Room, since any disturbance can imperil the safety of air navigation. In its view, considering that the incident which occurred on 4 June 2002 was not the first that the complainant had caused, the authorities took the urgent measures which they deemed necessary to maintain safety. It considers that the decision to have the complainant medically examined and to relieve him of his duties was not unlawful and was even in his best interest. It could therefore not be seen as an impairment of his dignity or misuse of authority. Since it appeared in September 2002 that there was no medical cause for his behaviour, the authorities concluded that it would not be advisable to reassign him to the Operations Room. The subsequent transfer was therefore an appropriate, proportionate measure taken in the interest of the service. It was brought about by the complainant’s own “awkward character”.

Eurocontrol denies that the complainant was downgraded. The decision of 19 September 2002 indicates that both his grade and his job title were to be maintained. His reference to Judgment 2027 is irrelevant.

The Agency argues, lastly, that a valid radar licence was not required for the complainant’s new duties and that if he was paid to do nothing, it was because he had made up his mind “to do nothing”.

D. In his rejoinder the complainant acknowledges that, as the operational support allowance has been paid since the filing of his complaint, his claim in that respect has become redundant. On the other hand, he argues that he had requested to stay in service beyond the age of retirement, given that he never stopped requesting the renewal of his radar licence from August 2002 onwards.

With regard to the presentation of the facts, he states that he was in no way responsible for the incident of 4 June

2002. In his view, that could have been established by means of an adversarial enquiry but he was never allowed a hearing. He says he is “surprised” to hear that his conduct had for some time been considered as causing “relational problems”. While he does not dispute that he could be required to undergo a medical examination, he disapproves in particular of the way it was imposed on him.

The complainant reiterates his pleas on the merits and adds that, while top priority clearly needs to be given to the safety of air navigation, this must not be used as a pretext to serve questionable ends; in his case, it was used as an excuse to have him forcibly evicted. When it emerged that the medical pretext was fallacious, the Agency fell back on the argument of air safety and the interest of the service, which, in his view, is unacceptable.

The complainant alters his claims and asks the Tribunal to order the Organisation to readmit him to the Operations Room so that his licence could be renewed. He presses his claims for 25,000 euros in damages and 3,500 euros in costs.

E. In its surrejoinder the Agency reiterates its objection to the receivability of the claim to renewal of the radar licence. It points out, moreover, that by the terms of Judgment 1496 the Tribunal cannot order the reinstatement of a retired official.

The Agency maintains its version of the facts and contends that the complainant is perfectly aware that the present case does not rest entirely on the incident of 4 June 2002. According to Eurocontrol, the complainant was given several opportunities to express his views, and the underlying reasons for Eurocontrol’s action did not change between June and September 2002, since it always acted in the interest of the service.

CONSIDERATIONS

1. The complainant asks the Tribunal to set aside Eurocontrol’s decision of 2 April 2003 rejecting his three internal complaints. He also seeks the renewal of his radar licence, which expired when he was removed from the Operations Room, and the payment of an operational support allowance which he ought to have received following his transfer in September 2002. In addition, he claims damages and costs.

2. The Agency pleads that the claim for payment of the operational support allowance is irreceivable and has in any case become redundant, as admitted by the complainant in his rejoinder, who acknowledges that he has received the allowance since his complaint was filed. It may be noted, however, that the grant of the allowance in question was mentioned in the decision of 19 September 2002, so that the complainant should not have submitted a claim in that respect to the Tribunal without first having asked the Agency to pay him the allowance.

3. In his rejoinder the complainant altered the claim concerning his radar licence. He now wants the Tribunal to order his reinstatement in the Operations Room, so that he can obtain the renewal of the said licence.

It would seem that the complainant is merely seeking to clarify his earlier claim, but, for the reasons set out below it is not necessary for the Tribunal to take that into consideration.

His arguments regarding the quashing of the transfer decision, and the wish to get back his radar licence will be dealt with on the merits.

4. The temporary decision to remove the complainant from the Operations Room following the incident of 4 June 2002 is not challenged as such.

Even though the form and the reasons of the decision may be questionable, it cannot be criticised in principle. Air traffic safety must remain a top priority. Without abusing its broad discretionary authority, the Organisation could legitimately consider that apparently recurrent altercations between colleagues in the course of their work in the Operations Room might constitute a risk factor for the safety of air navigation, and conclude that it was therefore preferable to assign the complainant to duties elsewhere.

5. On the other hand, the procedure leading up to the complainant’s transfer does not appear compatible with the applicable case law.

Transfer decisions may be non disciplinary, disciplinary, or mixed in nature. But whether or not the transfer arises

from disciplinary proceedings, the right of the staff member to be heard must be guaranteed. It matters little in this respect whether or not transfer is envisaged amongst the applicable disciplinary sanctions; what is decisive is “whether the transfer appears to be the consequence of alleged professional shortcomings of the staff member which may, by their nature, give rise to disciplinary sanctions” (see Judgments 2229, under 3, and 2285, as well as the case law referred to). The protection of the staff member’s dignity is at stake.

In the event, the Agency, which gave as the reason for the complainant’s transfer first his state of health and then his behaviour, did not comply with that case law. It states that the “friction” caused by the complainant’s “awkward character” might have been acceptable at another time and in another place, but that in the Operations Room such a situation could not be tolerated owing to the potential risk it might entail. It expresses the view, nevertheless, that his transfer cannot be considered to be a disciplinary sanction. The complainant denied the version of the facts put forward by his colleagues regarding the incident of 4 June 2002. Yet the Agency accepted that version despite the fact that it was not supported by any evidence, which would, in any case, have to be produced in compliance with the adversarial principle.

In the circumstances, the impugned decision is flawed. To set it aside, however, would be ineffective since the complainant has already retired.

6. However, the complainant may justifiably be granted compensation for the moral injury he has suffered.

Even though the Organisation may not have intended deliberately to harm the complainant, the latter nevertheless endured the consequences of a procedure which disregarded his rights and therefore impaired his dignity as a staff member.

The Agency explains that the radar licence is useful only for air traffic control duties performed at the UAC in Maastricht and that the complainant did not need it for the tasks he was assigned after his departure from the Operations Room. Furthermore, the complainant had not asked to stay on beyond the normal age of retirement, as is permitted under Article 1 of Appendix IV of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre, under certain conditions, for a maximum period of one year, renewable once only. The loss of his radar licence appears to have caused the complainant more of a moral injury. In the circumstances, it appears unrealistic to contemplate reinstatement solely for the purpose of revalidating the licence.

The Tribunal therefore considers that an award of 5,000 euros would represent fair compensation for the moral injury he suffered.

7. The Organisation shall pay the complainant 2,000 euros in costs.

DECISION

For the above reasons,

1. The claim for payment of the operational support allowance has become redundant.
2. Eurocontrol shall pay the complainant 5,000 euros in compensation for moral injury.
3. It shall pay him 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2004, 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 14 July 2004.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

*The radar licence is a certificate of competency required for all air traffic controllers working in the Operations Room. If a controller is absent from radar control duties in that room for three consecutive months, his licence automatically expires. In order to have his licence renewed, a controller must undergo special training.

Updated by PFR. Approved by CC. Last update: 19 July 2004.