

NINETY-EIGHTH SESSION

Judgment No. 2387

The Administrative Tribunal,

Considering the second complaint filed by Mr J.G. B. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 20 October 2003, the Agency's reply of 23 January 2004, the complainant's rejoinder of 9 April and Eurocontrol's surrejoinder of 23 July 2004;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Belgian national born in 1951, is assigned to the Human Resources Directorate at grade B2 but serves full-time as President of the Eurocontrol section of the European Civil Service Federation (hereinafter referred to as "FFPE-Eurocontrol").

On 29 December 2002 the complainant, acting as union leader, sent the Director General a "strike notice" which concerned staff at the Central Flow Management Unit (CFMU). The reason he gave for the strike was the excessive delay in implementing measures approved by the member States in favour of CFMU staff. He indicated that two types of industrial action would begin on 4 January 2003: "a work to rule" aimed at reducing activity to the minimum provided for in the current regulations and a "refusal of responsibility". The detailed instructions for this industrial action were given in an annex, which explained how the duties of staff in each category were to be carried out during the strike. He added that FFPE-Eurocontrol undertook to open and pursue negotiations as soon as possible. In a letter of 2 January 2003 the Director General said he was "surprised" at the FFPE's approach and, considering that the planned actions contravened existing rules and regulations, that they could cause severe damage to Eurocontrol's professional reputation and that they were disproportionate in relation to the union's claims, he described the strike as an illegal one. On that same day he sent a memorandum to all CFMU staff urging them "to continue performing [their] duties as usual and according to normal professional standards", and he warned that "the relevant statutory provisions [would] be applied" to any staff "who respond[ed] to the FFPE's call to industrial action".

On 3 January FFPE-Eurocontrol published a note giving instructions to staff on how they should answer the telephone: they were to inform callers that CFMU staff were taking industrial action and that their "query or complaint [would] be dealt with in accordance with the action in progress"; any questions or complaints should be addressed either to the Director General or to the Director of CFMU. That same day the acting Director of CFMU sent an instruction to all CFMU staff reminding them that, in accordance with Article 11, paragraph 1, of the Staff Regulations governing officials of the Eurocontrol Agency, an official must "neither seek nor take instructions from any government authority, organisation or person outside the Agency". He added that "[t]he FFPE [was] an organisation outside the Agency" and that its President should "be regarded as a person outside the Agency". Staff were therefore instructed not to use "the phraseology" contained in the FFPE-Eurocontrol's note, or they would face disciplinary action. In response to that instruction, the union published an information bulletin or "Flash Info" on 4 January, in which it denounced the breach of the right of association and accused the acting Director of "lying" by pretending that FFPE-Eurocontrol was outside the Agency. Industrial action was taken on 4 and 5 January. In reaction to the "Flash Info", the Director General sent a memorandum to all CFMU staff on 7 January, stating that the instruction from the acting Director of CFMU had his full support and represented the Agency's position.

On 3 April the complainant filed an internal complaint against the instruction of 3 January 2003 issued by the acting Director of CFMU. In an opinion dated 20 August the Joint Committee for Disputes recommended rejecting the complaint as irreceivable and unfounded. It pointed out that the complaint was not directed against an act causing grievance, since the complainant was not a member of the CFMU and was therefore not personally

affected by the instruction. Furthermore, in its view, the President of a union could not use the appeal channels provided for staff members to defend rights arising from their contracts. In a memorandum of 25 September 2003 the Director of Human Resources, acting on behalf of the Director General, rejected the internal complaint. That is the impugned decision.

B. The complainant puts forward three arguments in support of his complaint's receivability. Firstly, he considers that he was directly concerned by the disputed instruction since, as President of FFPE-Eurocontrol, he defends the interests of all staff, including CFMU staff, and the instruction was expressly directed against the call to industrial action launched by FFPE-Eurocontrol. Secondly, he asserts that the instruction "indicat[ed] that the call for industrial action was illegal" and it ordered staff, under the threat of sanctions, not to follow the call. In that sense, it did constitute an act causing grievance. Thirdly, he states that he is a fully-fledged staff member of the Agency, which, by denying him *locus standi*, "is acting outside the law and in breach of Article 92 of the Staff Regulations, of the most basic rights of defence and of the principle of equal treatment", which constitutes "an unspeakable measure of exclusion against [him] merely because he represents a trade union".

On the merits the complainant puts forward four pleas. Firstly, the internal appeal procedure was unlawful insofar as the Chairman of the Joint Committee for Disputes was a subordinate of the acting Director of CFMU, who issued the challenged instruction. Secondly, the Agency's position constitutes a threefold breach of Article 24a of the Regulations*. It "flouted freedom of association and infringed the necessary independence of the unions with respect to the Agency", since the said instruction constitutes "a totally unacceptable interference in relations between the staff and FFPE-Eurocontrol [...] infring[ing] the union's freedom of action". Furthermore, it relegated FFPE-Eurocontrol "outside the law" by considering it an "outsider" within the meaning of Article 11 of the Regulations. The complainant recalls that his union's membership includes only officials or staff members of Eurocontrol and that it has been officially recognised by the Agency. If FFPE-Eurocontrol were outside the Agency, no staff member could hold union office without the prior authorisation of the appointing authority. In addition, the defendant's position infringes the free exercise of the complainant's mandate as the elected president of a trade union. Thirdly, the acting Director of CFMU abused his authority by forbidding staff to follow the strike action under threat of sanctions. Fourthly, he was guilty of an act of intimidation aimed at discouraging staff from exercising their freedom of association. The complainant considers he suffered moral harassment insofar as the instruction issued to staff denigrated his action and discredited his mandate.

He asks the Tribunal to set aside the impugned decision, to quash the disputed instruction, to order Eurocontrol to pay him one euro as token compensation for moral injury and to grant him 4,000 euros in costs.

C. In its reply the defendant contends that the complaint is irreceivable on the grounds that the challenged instruction is not a decision adversely affecting him within the meaning of Article 92, paragraph 2, of the Regulations. In addition, since the instruction was not addressed to him, the complainant had no personal and direct cause of action, except as representative of FFPE-Eurocontrol. Lastly, it considers that the Tribunal is not competent *ratione materiae* insofar as the instruction breached neither the complainant's contract of employment nor the provisions of the Staff Regulations.

The Agency replies on the merits only subsidiarily. In its opinion the plea of unlawful procedure is an offence against the probity and impartiality of the Chairman of the Joint Committee for Disputes. It is in any case time-barred since it has been raised for the first time before the Tribunal. It points out that this staff member holds the same grade as the person who issued the instruction, who was only acting Director of CFMU for a limited time, and that, as Chairman, he does not take part in the voting except on procedural matters. It denies any breach of Article 24a of the Regulations on the grounds that FFPE-Eurocontrol – the local branch of a European civil service union – must be considered as being outside the Agency and that "the right of association does not allow a trade union which is outside the Organisation to interfere in the running of an operational service". As for the alleged abuse of authority, it counters that the instruction merely reminded staff of their statutory obligations and "did not prevent [them] from pursuing their claims or actions in any other manner". Lastly, it considers it abusive to interpret the instruction as "an act of intimidation", since it was "perfectly 'legal'" and did not amount to harassment.

D. In his rejoinder the complainant contends that the challenged instruction is indeed a decision since it "takes a stand" on FFPE-Eurocontrol's note of 3 January 2003 and forbids staff, under the threat of sanctions, to take the steps advocated by the union. By deeming participation in the strike action illegal, the acting Director of CFMU infringed a fundamental right, "causing direct injury to the individual rights of officials, including the

complainant". The latter confirms that he acted both as union representative (since he has no other function at Eurocontrol), which, in his view, gives him a personal and direct cause of action, and as a staff member whose rights have been breached in the exercise of his trade union duties. He was acting in his own interest and not in the interest of others. Lastly, he maintains that the disputed instruction is in breach of both the Regulations and certain fundamental rights.

On the merits the complainant explains that he never cast doubt on the probity of the Chairman of the Joint Committee for Disputes but that in this case the hierarchical link which well and truly existed at the time of the facts "objectively" raised a query regarding his independence, and the fact that he did not take part in the voting did not rule out the possibility of influencing the outcome of the dispute. The complainant reiterates his arguments regarding the breach of Article 24a of the Regulations. FFPE-Eurocontrol, which bears no "allegiance" to FFPE, cannot be considered as being outside the Agency. Furthermore, the note it issued was not an order but a call to action which each official was free to follow or not. With regard to the abuse of authority, he reiterates that the right of association was truly breached. He accuses the Agency of bad faith, pointing out that the defendant is careful to avoid specifying in what "other manner" staff could have pursued their claims. Such a possibility is in fact nowhere contemplated in the challenged instruction.

E. In its surrejoinder Eurocontrol submits that the disputed instruction is "no more than an expression of the Administration's position" and therefore cannot be considered as an administrative decision open to appeal. As for the breach of the complainant's rights in the exercise of his trade union duties, it considers that the assertion is excessive and is neither founded nor relevant.

On the merits, still as a subsidiary consideration, the defendant asserts that the complainant has not demonstrated in what respect the Chairman of the Joint Committee for Disputes failed in his duty of objectivity and impartiality. It points out that, although the latter was indeed under a subordinate of the acting Director at the time the challenged instruction was issued, he was no longer so at the time the internal complaint was heard. It notes that the union representatives on the Committee did not express any reservations in that regard. In its view, the complainant mistakenly equates the "right of association" with the "exercise of industrial action (strike)"; while Article 24a of the Regulations recognises the right of association, it does not condone, without distinction, all forms of action undertaken in the course of trade union activities. Furthermore, regardless of "the extent to which the FFPE trade union may be deemed to be outside the Agency", it is neither authorised nor competent to tell CFMU staff what working procedures and instructions they must apply. Eurocontrol adds that the union was at liberty to call on staff to undertake "real" strike action, that is to say, what it believes the Tribunal defines as "a collective work stoppage".

CONSIDERATIONS

1. The complainant has filed a complaint with the Tribunal asking it to quash the instruction of 3 January 2003, to set aside the decision of 25 September 2003 rejecting his internal complaint, and to award him one euro as token compensation for moral injury and 4,000 euros in costs. He submits that he has *locus standi* to challenge that instruction because it causes him injury and directly affects the interests he must defend as a trade union leader. On the merits, he contends that the procedure followed before the Joint Committee for Disputes was unlawful and that the disputed instruction breached the right of association recognised in Article 24a of the Staff Regulations, was tainted with abuse of authority and constituted an act of intimidation and "moral harassment in the exercise of his mandate".

2. The defendant Organisation, on the other hand, argues that the complaint is irreceivable on the grounds that the disputed instruction cannot be seen as an individual decision adversely affecting the complainant; moreover, the latter cannot argue that he has a personal and direct cause of action, "except as a representative of the FFPE trade union", which, as such, is not allowed to file an appeal for the purpose of protecting the interests of others or the general interest. In fact, the complainant, in its view, can hardly be said to be defending a legitimate interest in the light of the safety requirements of air navigation.

3. The Tribunal finds that the complainant does not show a direct cause of action in this case which would allow him to challenge the disputed instruction, since the latter was applicable only to the staff of CFMU, a body to which he does not belong. Insofar as he pleads in his capacity as trade union leader, he would be entitled to file a complaint with the Tribunal only on the basis of his personal employment relationship with the Agency – for

instance by challenging measures which concern him personally on account of his duties – but not in order to defend the collective interests of trade union members. On this point the Tribunal refers to consistent precedent (see, for instance, Judgment 1542 delivered on 11 July 1996). Without needing to ascertain whether the interest pursued by the complainant was legitimate or not, the Tribunal therefore dismisses as irreceivable the claims to quash the disputed instruction, to set aside the impugned decision and, as a consequence, the claims for compensation.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

 *Article 24a of the Staff Regulations reads as follows: “Officials shall have the right of association; they may inter alia belong to the trade union or professional organisations of European officials.”