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

100th Session **Judgment No. 2504**

The Administrative Tribunal,

Considering the complaint filed by Mr M. D. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 8 October 2004 and corrected on 19 November 2004, Eurocontrol's reply of 29 April 2005, the complainant's rejoinder of 9 August and the Agency's surrejoinder of 30 September 2005;

Considering Articles II, paragraphs 5 and 7, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant is a Belgian national born in 1957. From January 1995 he was employed by consultancy firms and placed with the Agency to provide specialised computing support. On 7 May 2004 the Head of Special Agreements faxed a letter to the consultancy firm then employing the complainant, informing it that the complainant would be asked to leave the premises of Eurocontrol with immediate effect and requesting a replacement. That is the impugned decision.

By letter of 12 May the complainant's counsel drew the Agency's attention to the improper terms on which it had, according to him, employed his client and Mr V. (see Judgment 2505 adopted this day). He explained that under the Belgian law of 24 July 1987 concerning temporary employment, the supplying of temporary employees and the provision of employees' services to users, such provision of services is forbidden if part of the "authority normally vested in the employer" is exercised by the user. Counsel alleged that he held evidence establishing that Eurocontrol had exercised such authority directly over his clients. He asserted that there had in fact been an indefinite contract between them and the Agency and he "served notice" on the Agency to reinstate them. In a letter dated 8 July 2004, which Eurocontrol contends it never received, counsel stated that his letter of 12 May was "obviously to be considered as an internal complaint within the meaning of Article 92" of the Staff Regulations governing officials of the Eurocontrol Agency.

B. The complainant endeavours to show that the Tribunal is competent to hear his complaint. While admitting that at the material time the Staff Regulations applied to only one type of employee, namely officials, and did not refer to personnel supplied by external employers, he contends that to deny him the right to lodge a complaint with the Tribunal is tantamount to breaching his right to appeal. In his opinion, under Belgian law the Agency must be considered as having been his employer jointly with the firm. He also points out that, while in Judgment 1369 the Tribunal stated that the only body of law it would not apply was national law, it did make an exception in the case of an express reference thereto in contracts of employment concluded by an organisation.

On the merits, the complainant contends that his assignment to Eurocontrol was unlawful and he produces various items of evidence to support his contention, such as requests to the Agency for annual leave, staffing charts showing his name, a series of e-mails concerning instructions he received from Eurocontrol. From these he deduces that the Agency must be considered as having been his true employer and that, from the start of his assignment, he should have enjoyed the "same remuneration and benefits as other officials".

The complainant asks for the implicit decision to reject his request for reinstatement to be set aside and for a provisional award of one euro in remuneration arrears. He wants to be reinstated or, failing that, to be paid 500,000 euros. Lastly, he claims 7,120.52 euros per month "until the ruling on his reinstatement is delivered" and 5,000 euros for moral injury.

C. In its reply Eurocontrol contends that the complaint is clearly irreceivable, since the Tribunal is not competent to hear the case. Only officials – or their successors in title – may lodge complaints with the Tribunal in the event of disputes concerning non-observance of the terms of their appointment or provisions of the Staff

Regulations. The Agency considers that it never had any direct contractual link with the complainant, only a commercial relationship with the various consultancy firms which employed him. Because no such contractual link exists, the Tribunal cannot apply national law. It points out that the complainant implicitly recognised that the Tribunal did not have jurisdiction since he brought a separate action before a national court.

The Agency argues that the complaint is also irreceivable on the grounds that internal means of appeal have not been exhausted. In its view, there was nothing in the letter of 12 May 2004 to indicate that it constituted an internal complaint in the meaning of Article 92(2) of the Staff Regulations. As for the letter of 8 July, which was never received by Eurocontrol, it could not be deemed a complaint either since it was not addressed to the Director General.

As a subsidiary argument, the defendant submits that for an employer to provide a user with the services of its employees is not in itself forbidden under Belgian law, as it often authorises a client user to manage some aspects and conditions of the work performed by the employee of a consultancy firm. It contends, however, that in no way may it be considered as having been the complainant's employer. Furthermore, it casts doubt on the evidential value of many of the items produced by the complainant, owing to the "easily manipulatable and falsifiable nature" of electronic mail. In its view, the items produced do not prove that the contract it entered into with the consultancy firm was unlawfully performed or that applicable Belgian legislation was breached.

D. In his rejoinder the complainant refers to several of the Tribunal's judgments in order to demonstrate that it has jurisdiction over this case and that Eurocontrol was his true employer. He explains that it was as a precautionary measure – in the event that the Tribunal might decline jurisdiction – that he had initiated proceedings before the Brussels labour court, and that the receivability of his complaint is in no way affected thereby. He also contends that, even though his letter of 12 May made no express reference to Article 92 of the Staff Regulations, "there is no doubt" that it did constitute an internal complaint.

On the merits, he submits that the defendant's statements are completely at odds with the evidence he has produced, which proves that it fully assumed the "authority of an employer".

E. In its surrejoinder the Agency maintains its position.

CONSIDERATIONS

1. From January 1995 to May 2004 the complainant was placed with Eurocontrol by several consultancy firms. These firms, to which he was successively bound by employment contracts, entered into agreements for the provision of services with Eurocontrol following a competitive tendering process.

On 7 May 2004 the Head of the Special Agreements Section in Eurocontrol sent the firm which was then providing the Agency with the complainant's services a fax, asking it to replace the complainant in accordance with the terms and conditions of that contract for the provision of services. He added that the complainant was going to be asked to leave the Agency's premises with immediate effect.

Arguing that Eurocontrol had used the services of the complainant and Mr V. improperly under the Belgian law of 24 July 1987 concerning temporary employment, the supplying of temporary employees and the provision of employees' services to users, counsel sent the Agency a letter dated 12 May 2004, "giving notice" to Eurocontrol to reinstate his clients and to recognise that they had enjoyed the status of official ever since they had started working for Eurocontrol. On 8 July 2004 counsel specified that his letter of 12 May constituted an internal complaint within the meaning of Article 92 of the Staff Regulations.

Having received no reply, the complainant filed a complaint with the Tribunal on 8 October 2004 against what he considers to be an implicit decision to refuse to reinstate him. His claims are listed under B, above.

2. The complainant argues in essence that his assignment to Eurocontrol by the consultancy firms was unlawful and that the Agency should be considered as having been his true employer.

He requests a hearing in view of the alleged complexity of the legal issues raised by this case.

3. For its main plea, Eurocontrol argues that the Tribunal has no jurisdiction to hear the case. It asserts that the

dispute arose in the context of a commercial relationship between itself and the various consultancy firms which successively employed the complainant, and that there was never any employment relationship or direct contractual link between the complainant and the Agency. In this respect it emphasises that both the Staff Regulations and the Statute of the Tribunal allow only officials – or their successors in title – the right to appeal in the event of disputes arising from the non-observance of the terms of their appointment or provisions of the Staff Regulations.

It adds that according to Article 93 of the Staff Regulations disputes shall be referred to the Tribunal "in the absence of a competent national jurisdiction".

Lastly, it draws attention to the fact that the complainant's pleas are entirely based on the interpretation and application of Belgian law. It notes, however, that the Tribunal has on several occasions stated that it will not apply the national law of a State, save where there is an express reference thereto in the organisation's staff regulations or in contracts of employment it has entered into.

4. The complainant replies that in principle, under Article II of the Statute of the Tribunal and Article 93 of the Staff Regulations, the Tribunal has jurisdiction to hear any dispute between the Agency and one of its staff.

He submits that Eurocontrol cannot challenge the Tribunal's jurisdiction on the grounds that he was not an official, in support of which he cites several of the Tribunal's judgments:

– Judgment 122, which states that:

"[w]hile the Staff Regulations of any organisation are, as a whole, applicable only to those categories of persons expressly specified therein, some of their provisions are merely the translation into written form of general principles of international civil service law; these principles correspond at the present time to such evident needs and are recognised so generally that they must be considered applicable to any employees having any link other than a purely casual one with a given organisation, and consequently may not lawfully be ignored in individual contracts. This applies in particular to the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure."

The complainant concludes that to deny him the right to lodge a complaint with the Tribunal "like any other official" of the Agency would be tantamount to violating the general principle of the right to appeal.

– Judgment 1383, in which, according to him, the Tribunal considered that the term "appointment", and *a fortiori* the term "occupation", should be given a broad interpretation;

– Judgment 1302, which he cites *a contrario*. He submits that in that judgment the Tribunal dismissed the complaint on the grounds that the plaintiff, who was providing his services on behalf of an external firm, did not prove that he had worked under the control and supervision of the organisation and therefore directly for it. He deduces that, *a contrario*, if he is able to establish that he was working under Eurocontrol's direct authority and control and that he can thus be considered as "holding an appointment" with the Agency, the Tribunal will have jurisdiction.

He considers that under Belgian law there is no doubt that, although he was indeed providing services on behalf of an external firm to Eurocontrol, the Agency should be considered as having been his employer jointly with the firm, since in his view he worked on the basis of an indefinite contract from the beginning. He adds that even though, as stated in Judgment 1311, the Tribunal need apply only a defendant organisation's Staff Regulations, in Judgment 1369 the Tribunal ruled that it "must enforce the law within the full ambit of the competence its Statute vests in it. For that purpose it will apply any material rule of law, be it international or administrative or labour law or any other body of law. The only sort it will not apply is national law, save where there is express *renvoi* thereto in staff regulations or contract of employment". He considers that in his case, according to the Belgian law of 24 July 1987, as soon as he began to provide his services, he was deemed to have entered into an employment contract governed by Belgian labour law, so that the Tribunal must therefore have jurisdiction.

He also refers to Judgment 322, under 2, in which the Tribunal found the following:

"In accordance with Article II of its Statute the Tribunal hears complaints of breach of terms of appointment or of Staff Regulations and Staff Rules. In reaching its decisions it construes such texts by the accepted methods of legal interpretation. It also draws upon general principles of law in so far as they may apply to the international civil

service. It takes no account of municipal law, however, except in so far as such law embodies those principles."

He maintains that in the present case, Belgian law does embody general principles of that kind, including the principle that the services of employees may not be provided to user entities.

5. Article II of the Statute of the Tribunal provides that:

"[...]

5. The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure, and which is approved by the Governing Body.

6. The Tribunal shall be open:

(a) to the official, even if his employment has ceased, and to any person on whom the official's rights have devolved on his death;

[...]"

Article 93(1) of the Staff Regulations states that:

"Any dispute between the Agency and one of the persons referred to in the present Staff Regulations involving non-observance, in substance or in form, of the provisions of the present Regulations, shall be referred to the Administrative Tribunal of the International Labour Office, in the absence of a competent national jurisdiction."

6. In the present case, it is clear that the complainant entered into contracts with the consultancy firms which supplied his services to the Agency, but never with the Agency itself.

According to the above provisions the Tribunal is only competent to hear complaints alleging non-observance of officials' terms of appointment and of provisions of the Staff Regulations which apply to them.

The complainant does not enjoy the status of an official of Eurocontrol and has produced no employment contract between himself and the Agency. The numerous previous judgments on which he relies are not relevant to his situation or of no avail. In each of those cases there was a legal link between the complainants and the international organisations. This is not so in this case.

Certain items of evidence, which are intended to prove that the Agency was the complainant's true employer, in fact only reflect the control which an international organisation is entitled to exercise, on its own premises, over staff providing services to it on behalf of an external employer. In this respect, the complainant's arguments based on the interpretation and application of Belgian law are of no avail.

The conclusion is that the Tribunal has no jurisdiction to hear the present case (see Judgment 2503, also delivered this day).

The complaint must therefore be dismissed without any need for the hearings requested by the complainant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2005, 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 1 February 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2006.