

The Administrative Tribunal,

Considering the complaint filed by Mr H. C. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 23 December 2005 and corrected on 23 March 2006, the Agency's reply of 1 June, the complainant's rejoinder of 11 August and Eurocontrol's surrejoinder of 11 October 2006;

Considering Article II, paragraph 5, 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, a Swiss national born in 1949, joined the Eurocontrol Agency in 1992 as an Expert at grade A6 in the Directorate of the General Secretariat (DGS). He was assigned to Bureau GS.4 (entitled "Internal Services" and later "Logistics and Support Services"), where he held the position of Head of the "Library and Archives" Section. After being elected secretary of the Central Staff Committee, he was detached to that Committee by the Director of Human Resources starting 10 February 2003.

In a memorandum of 5 November 2004 the complainant informed the Director of Human Resources that he did not intend to request the renewal of his detachment to the Staff Committee when his term of office ended on 20 December 2004, and that he therefore wished "to return to [his] former position as Head of Library, Documentation and Archives". From March 2005 onwards, the complainant had several interviews with the Director of the DGS regarding his assignment. On 18 March he filed an internal complaint asking to be reinstated in his former position.

On 24 March a notice of competition was issued for the post of Head of the Agency Library, Documentation and Archives Unit (referred to hereinafter as ALDA). The complainant applied for the post. On 18 April he filed a second internal complaint seeking the cancellation of the competition and reinstatement in his former position. By a memorandum dated 29 April 2005 he informed the Chairman of the Selection Board, who was Head of Recruitment and Job Management, that he had applied for the post only on a precautionary basis since he had in fact filed a complaint calling for the competition to be cancelled. In two opinions dated 7 July 2005 the Joint Committee for Disputes recommended rejecting the complainant's complaints. It pointed out that "because ALDA ha[d] undergone an in-depth reorganisation since June 2004, it [was] clear that the complainant [could] not be reinstated in exactly the same position as the one he held prior to his departure", and that the post advertised in the relevant notice of competition was different from the one he occupied previously. It also found that Article 39 of the Staff Regulations governing officials of the Eurocontrol Agency, on which the complainant was relying, concerned "secondments" outside the Agency and not detachment within it and that since he was currently engaged in discussing the terms of his reassignment, he no longer had a cause of action. In a letter of 3 August 2005 the Head of Recruitment and Job Management informed the complainant that another candidate had been selected as Head of ALDA. In a memorandum of 28 September 2005, which constitutes the impugned decision, the Director General rejected the internal complaint filed by the complainant on 18 April. On 12 October 2005 the Director of the DGS informed the complainant that he was assigned to the post of Head of the Awareness Section in charge of the Eurocontrol Publications and Information Centre (EPIC). This post was placed below that of Head of ALDA.

B. The complainant submits that before being elected to the Central Staff Committee he performed the duties of Head of the "Library, Archives, [M]ail and Documentation" Section, directly under the authority of the Head of Bureau GS.4, that he used to act as assistant Head of Bureau and that he had been delegated the management of current affairs by decisions of 7 December 1994 and 20 February 1998. He argues that, since detachment is not provided for under the Staff Regulations, he remained assigned to the DGS and should have returned to his duties as Head of the aforementioned section at the end of his detachment. Since that did not occur, he considers that he was not afforded the protection to which members of bodies representing the staff are entitled under Articles 9 and 10 of the Staff Regulations which recognise freedom of association. He adds that the decision to "abolish [his]

post” and to assign him to that of Head of the Awareness Section “in fact amounts to a form of sanction insofar as it affected his hierarchical position as the head of a section in charge of several units”.

The complainant further contends that the decision rejecting his application for the post of Head of ALDA was taken in breach of Article 30 of the Staff Regulations, insofar as according to him the decision to appoint the successful candidate had been taken ten months prior to the publication of the notice of competition. He accuses the Agency of misuse of procedure and misuse of authority on the grounds that it favoured one candidate at the expense of the others.

The complainant asks for the quashing of the impugned decision and, “[i]f appropriate”, of the decision appointing the candidate chosen for the post of Head of ALDA. He also claims costs.

C. In its reply Eurocontrol rebuts the complainant’s assertion that he was delegated authority to manage current affairs in Bureau GS.4. It submits that the decision to detach the complainant in no way implied that at the end of his term of office he would resume his previous duties in the DGS. The Agency’s only obligation was to reinstate him, within the DGS, in a job in his category at the grade that he held. The decision of 12 October 2005 did not detract from his dignity but represented a solution which fulfilled two essential requirements: on the one hand it was satisfactory for the complainant whilst remaining within the bounds of the Staff Regulations, and on the other hand it served the interests of the service. It maintains that the complainant’s post was not abolished, though it admits that his duties were modified, re-evaluated or redistributed as a result of the restructuring, centralisation and modernisation of the Agency’s documentation services.

Eurocontrol denies that the competition was held in order to appoint a candidate who had already been chosen. It contends that there was no breach of the principle of equal treatment. It points out that the job that was offered was not the same as the one the complainant performed prior to his detachment. It is confident that the procedure for filling posts, as provided for in Article 30 of the Staff Regulations, was strictly followed. It does admit, however, that the appointed candidate who had been in charge of ALDA since its inception, had done a great deal for its start-up and development, and whose performance had been satisfactory, did have a “head start”; it adds, however, that the complainant fails to show any misuse of authority.

D. In his rejoinder the complainant submits that Article 37 of the Staff Regulations “gives an exhaustive list of the various administrative statuses” to which officials may be assigned and that detachment cannot be considered as an additional category. That means that he remained in “active employment” (one of the administrative statuses listed) throughout his trade union mandate. He points out that in the event the whole of the staff of the “Central Library Service” was “transferred”, which casts doubt on whether “the service was really restructured”. He adds that he incurred a substantial injury as a result of the fact that, from end December 2004 – the end of his mandate – until 12 October 2005 – the date at which it was decided to assign him to the post of Head of the Awareness Section – he did not hold a position corresponding to his grade and duties. According to him, the defendant has admitted that it organised the competition solely in order to remedy the situation of one official and he accuses it of failing to show that it took due account of the principle whereby he should not be adversely affected as a result of performing trade union duties. He considers on the contrary that he was actually penalised on account of being detached to the Central Staff Committee.

E. In its surrejoinder Eurocontrol confirms that “a general restructuring did take place on the basis of a series of individual decisions”. In its view, the complainant has not shown that he suffered any injury in connection with his trade union duties. It recalls that international organisations enjoy broad discretion in the organisation of their services and the assignment of their staff and adds that the complainant’s personal interests cannot take precedence over the interests of the service. Lastly, it indicates that, although any individual reassignment may entail adaptation and changes of duties, the principle of job equivalence was observed.

## CONSIDERATIONS

1. The complainant, who had been detached to Eurocontrol’s Central Staff Committee from 10 February 2003 to 20 December 2004, could not be reinstated in his former duties owing to the restructuring of his section.

In a memorandum of 12 October 2005 the complainant was assigned to the post of Head of Awareness Section in charge of EPIC within ALDA.

2. Considering that his hierarchical position was adversely affected, the complainant challenges before the Tribunal the Director General's decision "to reject the internal complaint he filed against the refusal to reinstate him as Head of Library and Archives after the end of his detachment" and, "[i]f appropriate", the decision appointing another person to the post of Head of ALDA.

*Regarding the application for hearings*

3. The complainant contends that the defendant has breached the principle of freedom of association as well as Articles 9 and 10 of the Staff Regulations.

He requests hearings on the grounds that this dispute concerns the obligation of international organisations to protect staff members who act as staff representatives, and in particular to provide them with guarantees that exercising such duties in the interest of the staff as a whole will not adversely affect the development of their careers. In his view the outcome of the dispute will therefore be of extreme importance for all the Organisation's staff.

Eurocontrol considers that the detailed written submissions and many attachments are sufficient to enable the Tribunal to give a ruling in this case without the need for hearings.

The Tribunal concurs and therefore disallows the application for hearings.

*Regarding the competition procedure*

4. The complainant accuses the defendant of misuse of procedure and misuse of authority on the grounds that it favoured one candidate at the expense of all the others. He contends that the decision of 19 June 2005 rejecting his application for the post of Head of ALDA was taken in breach of Article 30 of the Staff Regulations. According to him, that article, which lays down rules for the selection of candidates for vacant posts, obliges the Agency to recruit only the best qualified persons. In this case, however, although the notice of competition was published on 24 March 2005, the Director of the General Secretariat had decided as early as 18 May 2004 to appoint the candidate who was ultimately selected for the post. The latter was therefore never made to compete with other suitable candidates.

According to the complainant, there are specific, solid and converging indications that the defendant held the competition not in order to fill the disputed post by appointing the candidate with the best skills and aptitudes but solely for the sake of appointing a pre-selected candidate in order to "remedy" her administrative situation.

He concludes therefore that the impugned decision is unlawful and must be quashed.

5. The Agency replies that the complainant does not show in the least that Article 30 of the Staff Regulations was misapplied in his case. It argues that the competition provided an opportunity for the complainant to convince a selection board that he had the necessary skills and aptitudes to perform duties which were not identical to those he exercised prior to being detached to the Staff Committee. In its view the complainant is wrong to believe that it abused the selection procedure for the vacant post since the conditions laid down in Article 30 of the Staff Regulations for the filling of vacant posts were strictly observed.

It adds that it was quite natural for the successful candidate, who had been in charge of ALDA from the time it was set up and had contributed greatly to its start-up and development, to apply for the advertised post in order to be confirmed in the position. In the defendant's view it is not because a selection board finds that the person already performing the duties of the advertised post satisfactorily is the best candidate that the competition should be considered flawed and its outcome a misuse of authority.

6. Article 30 of the Staff Regulations reads as follows:

"1. Before filling a vacant post, the Director General shall inform the Agency staff and the States party to the EUROCONTROL Convention.

The selection of candidates shall be based on qualifications or, for certain posts provided for in Article 28, paragraph d), on examination or on qualifications and examination in accordance with the conditions laid down in paragraph 2 below.

2. For each competition, a selection board shall be appointed by the Director General. This Board shall draw up a list of suitable candidates, in order of merit and without distinction of nationality.

The Director General shall decide which of these candidates to appoint to the vacant posts.

In the event of a selection being made which is not in conformity with the list drawn up by the selection board, reasons for the appointment shall be given in consequence.

3. The procedure laid down in paragraphs 1 and 2 above may also be adopted with a view to constituting a reserve for future recruitment.”

The Tribunal has consistently held, as it confirmed in its Judgment 2163, that “an appointment by an international organisation is a discretionary decision. Being subject to only limited review, it may be set aside only if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence. The Tribunal will, in cases like the present, exercise its power of review with special caution, its function being not to judge the candidates on merit but to allow the organisation full responsibility for its choice.”

In this case, the question is on the one hand whether there was misuse of authority, as the complainant contends, and whether it was the candidate offering the best skills and aptitudes who was eventually selected, and on the other hand whether the complainant was unfairly treated on account of his activities in the Staff Committee.

7. The Tribunal finds that the competition procedure laid down in Article 30 of the Staff Regulations was properly applied to fill the post of Head of ALDA and that the duties of that post were not the same as those previously performed by the complainant. It also finds that the latter has not shown that the successful candidate was chosen for any reasons other than those given by the Selection Board, since the mere fact that she already performed the duties concerned on a provisional basis prior to the competition cannot in itself constitute conclusive evidence of misuse of authority. Nor is there any indication in the submissions that the Selection Board showed partiality to the detriment of the complainant.

#### *Regarding the complainant's reassignment*

8. The complainant contends that the decision to abolish his post and to reassign him is unlawful and must be quashed. He states that he was “detached” to the Staff Committee even though such detachment is not provided for in the Staff Regulations. Since he was not on secondment, his administrative status remained that of active employment. Consequently, in accordance with Article 7 of the Staff Regulations, he should have been assigned, in the interests of the service, to a post corresponding to his grade. In the detachment decision of 10 March 2003, it was specified that his post remained assigned to the DGS. This means, according to him, that his assignment as Head of the “Library, Archives, [M]ail and Documentation” Section had never ceased and that at the end of his detachment, he should have returned to his duties as Head of that section. He considers that the Agency, which did not reinstate him in his former position, failed to provide the protection to which all members of bodies representing staff are entitled pursuant to Articles 9 and 10 of the Staff Regulations, which guarantee the general principle of freedom of association.

He argues that in making no provision for members of the Central Staff Committee to be seconded in the interest of the service, the legislator of the Organisation afforded them more suitable protection, by stipulating that they remain in active employment and hence assigned to their post, which therefore cannot be considered vacant.

He concludes that the abolition of his post constituted a breach of the right of association and of the special protection to which members of bodies representing the staff are entitled.

Furthermore, the complainant contends that the decision to abolish his post, whereas the decision to detach him stipulated expressly that his post remained assigned to the DGS, and to assign him to that of Head of the Awareness Section following a reorganisation “in fact amounts to a form of sanction insofar as it affected his hierarchical position as the head of a section in charge of several units”.

9. The defendant points out that the complainant's budgetary post was not abolished, that the duties he

performed prior to his detachment were changed, re-evaluated or redistributed following the restructuring, centralisation and modernisation of the Agency's documentation services, that the complainant's budgetary allocation remained unchanged and that, contrary to what he insinuates, the decision of 10 March 2003 to detach him in no way implied that he would necessarily be reinstated in his duties, whether they had changed or not.

It maintains that it had no obligation to reinstate the complainant as Head of ALDA at the end of his detachment and that, compared with his previous assignment within the DGS, his appointment of 12 October 2005 as Head of the Awareness Section in charge of the EPIC does not constitute a decision that detracts from his dignity.

It asserts that the right of association recognised in Article 24a of the Staff Regulations was not infringed and that the complainant cannot seriously maintain that his new assignment amounts to a form of sanction imposed because he defended the interests of staff within the Staff Committee.

10. The relevant part of Articles 9 and 10 of the Staff Regulations, to which the complainant refers, read as follows:

“Article 9

1. There shall be set up:

– a Staff Committee, which may be organised in sections for the different places of employment;

[...]

The composition and procedure of these bodies shall be determined by a ruling of the Director General.

Article 10

1. The Staff Committee shall represent the interests of the staff vis-à-vis the Agency and maintain continuous contact between the Agency and the staff. It shall contribute to the smooth running of the service by providing a channel for the expression of opinion by the staff.

It shall bring to the notice of the competent bodies of the Agency any difficulty having general implications concerning the interpretation and application of these Staff Regulations. It may be consulted on any difficulty of this kind.

The Committee shall submit to the competent bodies of the Agency suggestions concerning the organisation and operation of the service and proposals for the improvement of staff working conditions or general living conditions.

The Committee shall participate in the management and supervision of social welfare bodies set up by the Director General in the interests of its staff. It may, with the consent of the Director General, set up such welfare services.”

11. Having examined the submissions, the Tribunal finds no breach of the provisions cited above or of the general principle of freedom of association referred to by the complainant.

While it is true, as the Tribunal recalled in Judgment 2156, that “elected representatives of the staff enjoy specific rights and safeguards in accordance with the general principles which govern employment relationships in international organisations and which are also generally recognised in national labour legislation”, it is still up to the staff member complaining that such specific rights and safeguards have been violated to prove that fact and not merely rely on bald assertions.

The Tribunal in the present case finds no breach of freedom of association. On the contrary, the defendant proved helpful in agreeing to detach the complainant to serve on the Central Staff Committee.

12. The Tribunal finds from the submissions that the plea based on the abolition of the complainant's post is not supported by the facts. It was a question not so much of the complainant's individual post being abolished but of the whole of a service being reorganised. As the Joint Committee for Disputes rightly pointed out, this reorganisation necessitated a period of adjustment before the complainant could be reinstated.

It is clear that, in view of the restructuring which took place during the complainant's detachment, he could not be reinstated in exactly the same position as the one he held before being detached to the Staff Committee. Moreover, he has no grounds for maintaining that the job to which he was assigned is not "equivalent" to the one he had left since the new job corresponds to his former category and grade.

13. Nor has the complainant shown that his new assignment constitutes a sanction, since the fact that he was placed under the authority of the head of a new service did not in itself detract from his hierarchical status as head of section prior to the reorganisation.

14. Since none of the pleas succeeds, the complaint must be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet