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

105th Session **Judgment No. 2725**

The Administrative Tribunal,

Considering the third complaint filed by Mr S. P. against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 12 February 2007 and corrected on 27 February, Eurocontrol's reply of 28 June, the complainant's rejoinder of 1 August and the Agency's surrejoinder of 9 November 2007;

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 Belgian national born in 1968, joined Eurocontrol on 16 February 1993. Since then he has worked as a grade B1 air traffic controller in the Operations Division of the Maastricht Upper Area Control Centre. The air space controlled by the Centre is divided into three sectors. The complainant is assigned to the DECO sector covering the Netherlands and north-western Germany.

In order to cope with the increase in air traffic, the Centre's senior management introduced a temporary measure whereby extra leave was granted to alleviate the hardship and workload of some members of the operational and operational support staff during the months of July to September 2006. The senior management did not, however, give extra leave to the staff assigned to the DECO sector. The Director of the Centre approved this initiative on 11 April 2006 and the complainant was informed of it by e- mail on 19 April.

On 17 July 2006 the complainant, relying on Article 91(2) of the General Conditions of Employment Governing Servants at the Eurocontrol Maastricht Centre, submitted an internal complaint to the Director General of the Agency against the decision to implement this initiative which, in his opinion, was discriminatory. He impugns the implicit dismissal of that complaint.

B. The complainant argues that air traffic reports for 2005 and 2006 point to similar growth in traffic in all three sectors, and even a slightly larger expansion in the DECO sector in 2005. He denounces the Agency's violation of the principle of equal treatment, according to which officials in the same staff category, subject to the same staff rules and the same working conditions, must receive equal treatment and equal remuneration for work of equal value. In his view, the discrimination introduced by the disputed measure is all the more glaring because operational support staff are granted extra leave although they are not experiencing any staffing problems, their workload remains unchanged and some of them are not on duty at night.

In addition, the complainant states that the Director of the Centre deliberately implemented a system that he knew to be discriminatory and that he purposely imposed it without consulting the staff concerned or their trade union representatives.

The complainant requests the quashing of the Director's decision of which he was informed on 19 April 2006. He claims costs in the amount of 1,500 euros.

C. In its reply the Agency disputes the receivability of the complaint inasmuch as it is directed against a general measure that does not injure the complainant because his situation is different from that of the controllers to whom the measure applies.

Eurocontrol replies subsidiarily on the merits. It emphasises that a project to enhance the organisation of shift work

as a whole, on which the social partners were consulted, was launched in December 2004. Nevertheless, in view of the slow progress of discussions and the need to plan for increased air traffic in the summer of 2006, the senior management decided in April 2006 to introduce the disputed temporary measure. The Agency relies on Article 6 of Rule No. 21 concerning the working conditions and allowances applicable to staff performing shift work, stand-by duties and overtime, which stipulates that in the case of fortuitous events or *force majeure*, departures may be made from the provisions governing working conditions as exceptional and temporary measures. It therefore argues that the Director of the Centre could adopt any measure needed to ensure the maintenance of an optimum level of air traffic safety without being obliged to consult the social partners on such an exceptional and temporary measure.

The Agency further submits that while all members of staff at the Centre are subject to the General Conditions of Employment, operational working conditions vary from one control sector to another and according to circumstances such as traffic density and the availability of personnel. It points out in this connection that Article 5 of Rule No. 21 gives the Director of the Centre the necessary leeway to take account of specific conditions in each sector. Unlike the other sectors, which lacked qualified staff and where the rosters allowed controllers only the minimum legal rest period, the DECO sector had plenty of staff and was not therefore in the same situation. According to the Agency, the principle of equal treatment was not breached.

D. In his rejoinder the complainant submits that his complaint is receivable since the disputed measure injures him by expressly excluding him from its sphere of application.

The complainant queries the existence in this case of a fortuitous event or *force majeure*, and points out that air traffic has been steadily expanding for many years and that its growth is therefore foreseeable. Eurocontrol therefore had a duty to consult the social partners, in accordance with the provisions of Rule No. 21. He further states that, even if the other two sectors are even more understaffed than DECO, the latter is also overworked and chronically understaffed. He refers again to the discrimination that he has suffered.

The complainant claims 1,181.15 euros in damages and now requests 2,000 euros for costs.

E. In its surrejoinder the Agency maintains its position with regard to the complaint's irreceivability. It points out that the complainant's request for damages constitutes a new claim and must therefore be dismissed.

Subsidiarily, it stresses that even though the growth in air traffic has been similar in all three sectors, DECO was able to spread the workload among a greater number of staff. For several years the operational support teams had likewise been suffering from a lack of staff and tight rosters. Furthermore, the figures quoted by the complainant do not reflect seasonal fluctuations, especially the very sharp rise in traffic in the summer of 2006, which justified the adoption of temporary measures. The Agency provides the figures on which the Director of the Centre based his decision. It explains that the trade union representatives were formally consulted on the project launched in 2004, but that they did not consider it useful to pursue the dialogue on this subject.

CONSIDERATIONS

1. The complainant is a Eurocontrol official who has worked in the Operations Division of the Maastricht Upper Area Control Centre since 16 February 1993. He is assigned to the Centre's DECO sector.

2. Given the strict safety requirements applicable to air traffic control, the Agency decided to organise the working hours of air traffic controllers on the basis of a special system of alternating work periods (in principle four days) and rest periods (in principle two days).

On 19 April 2006 the Agency circulated a document to the staff announcing a temporary initiative whereby two or three extra days' leave were offered during the summer months of 2006 to categories of staff who were most exposed to pressure and fatigue. This measure did not apply to DECO staff. A prior confidential report contained two comments in this regard:

"The project is aiming at alleviating some of the hardship of the current rosters. Because of the comfortable staffing levels in the DECO sector, the Project Team recommends that DECO sector staff members do not fall within the scope."

and

“The fact that DECO sector staff could claim being discriminated must be recognized. Assessments of the staffing figures for July, August and September 2006 does however show a substantial surplus of staff for the DECO sector.”

3. On 17 July 2006 the complainant lodged an internal complaint with the Director General, requesting him to revoke the measure, which he deemed to be discriminatory. The only response he received to that complaint was an acknowledgement of receipt dated 30 August 2006. On 12 February 2007 the complainant therefore challenged before the Tribunal an implicit decision of rejection within the meaning of Article VII, paragraph 3, of the Tribunal’s Statute.

4. On 9 February 2007, however, the Agency notified the complainant of the dismissal of his internal complaint of 17 July 2006. In the internal memorandum sent to the complainant the Director of Human Resources stated, on behalf of the Director General, that he fully supported the findings of the Joint Committee for Disputes, which were expressed as follows in its opinion of 1 February 2007:

“The Joint Committee noted that staff from different sectors were treated differently, but this does not constitute an inequality of treatment or discrimination per se, if a justification exists. The Joint Committee also noted that such a measure could be justified in the absence of a new roster to be developed soon (mid 2007) where the structural staffing problems would be corrected. In that frame, the grounds given by Management appear valid provided this measure remains temporary and does not become structural.”

The Committee also referred to the following explanations provided by the management of the Maastricht Centre:

“The aim of the initiative is to alleviate hardships created by the roster during the busy summer period 2006 when shift performing staff in the Hanover and Brussels sectors [were] working at minimum staffing levels and rest time. The DECO sector, which has a relative higher staff complement, was not experiencing a similar constraint. DECO sector staff [are] therefore not entitled to extra off days under the measure.”

5. The Agency submits that the complaint is irreceivable because it is directed against a general measure that confers benefits on third parties without harming the complainant’s interests and because the complainant does not claim that he should be offered the same benefits.

This objection is unfounded. The complainant is entitled to challenge before the Tribunal a decision that confers benefits on third parties if it may result in unequal treatment to his detriment.

6. The complaint was filed against an implicit decision to dismiss the internal complaint of 17 July 2006. However, the Agency issued an express decision on that internal complaint on 9 February 2007. It would arguably offend the principle of procedural economy to rebuke the complainant for failing to withdraw his complaint in order to challenge that express dismissal by means of a separate complaint. In any event, this issue is not decisive in the present case and it is of little consequence in this regard that the claims in the rejoinder do not explicitly seek to have the decision taken on his internal complaint set aside.

7. In the light of the foregoing, the Tribunal will rule solely on whether the disputed measure is discriminatory in that it affords certain categories of staff benefits that it denies the complainant.

8. In the complainant’s opinion, staff in the DECO sector to which he is assigned belong to the same category of staff and have the same duties as those in the sectors to which the aforementioned measure applies. Moreover, the DECO sector is allegedly also overworked and understaffed. He contends that the discrimination against staff in that sector is all the more shocking in that operational support staff have also been granted extra days of leave although they are not experiencing any staffing problems and some of them are not on duty at night.

(a) The complainant provides no evidence to refute the finding of the management of the Maastricht Centre that air traffic safety called for urgent and temporary measures on behalf of certain categories of staff. Nor does he show that the urgency of the situation demanded that such measures should also be taken on behalf of the category to which he himself belongs. Besides, the disputed measure was introduced on a temporary basis and was applicable only for the summer 2006 period.

(b) Furthermore, it cannot but be inferred from the figures provided by the Agency in its surrejoinder and from

the documents produced by the parties that the working hours of staff in the sectors that benefited from the disputed measure needed to be reduced temporarily in the interests of air traffic safety. The figures also indicate that those same interests did not require that relief should also be granted during the period in question to staff working in the sector to which the complainant is assigned.

The question as to whether the measure taken was the most appropriate one under the circumstances lies beyond the power of review of the Tribunal, which must allow the administrative bodies of organisations falling within its jurisdiction particularly wide discretionary authority in that respect.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 May 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.